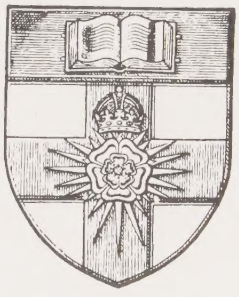
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346 Mx. North Gall.



UNIVERSITY OF LONDON
LIBRARY

THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED

OCTOBER 14, 1949 TO DEC. 18, 1950

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

VOL. 34

LONDON:
SWEET AND MAXWELL, LIMITED,
2 & 3 CHANCERY LANE, W.C.2

TORONTO:
THE CARSWELL CO., LIMITED

SYDNEY, MELBOURNE, BRISBANE:
THE LAW BOOK CO. OF AUSTRALASIA PTY LIMITED

1951

(Printed in England)

BIBL. LONDIN UNIV.

This Volume should be cited as 34 Cr. App. R.

BIBL.
LONDIN.
UNIV.

APPELLANTS AND APPLICANTS

	PAGE
ACKERS, A.	108
Apicella, B.	29
Aves, J. R.	159
BADSEY, S. B.	135
Barrett, J.	3
CLARKE, D.	65
Cohen, R. A.	239
Collins, H.	146
DALLIMORE, K. R.	168
Dickson, R.	9
EVANS, T. J.	72
FAITHFUL, F. A.	220
Franks, H.	222
French, D. G.	79
Furlong, V. H.	79
GATENBY, V.	255
Grant, R. M.	230
Green, S.	33
HARRIS, R. V.	184
Hewitt, W. A.	163
Heyes, P.	161
Hopkins-Husson, F. J.	47
Hunt, J. H.	135
ION, L. G.	152
JOHNSTONE, F. S.	107
KEELER, W. G.	26
Kelly, G.	95
Kinally, B. J.	163
Kirkup, J.	150
LAKER, H. W.	36
Ledger, F. W.	117
Lord, H. J. V.	168
MALLON, C. L.	168
Matthews, L. E.	55
Morris, C.	210
Murphy, M. C.	18
Murray, M.	203
O'NEILL, F.	108
PARKIN, J. H.	1
Parry, G. J.	224
Parry, J. H.	224
Payne, R. A.	43
Pickard, F. J.	79
Pople, M. W.	168
Pryce, C. L.	21
REYNOLDS, E. A.	60
Rivett, J. F.	87
SEDGWICK, W. H.	156
Shepherd, A.	236
Smith, W. C.	168
Speakman, P. P.	24
Spriggs, D. M.	224
TAYLOR, J. W.	138
VALLETT, C.	251
WALKER, T. S.	199
ZIELINSKI, E. W. B.	193

PAGE

PRACTICE NOTE 42

DIVISIONAL COURT CASES

PAGE

R. *v.* Middlesex Quarter Sessions & another; *Ex parte* Director of Public Prosecutions 112

R. *v.* Norfolk Justices & another; *Ex parte* Director of Public Prosecutions 120

TABLE OF CASES

[*The letters "R. v." in criminal cases are omitted*]

PAGE

Bartlett *v.* Smith (1843) .. 205
Benson (1908) 171
Birdseye (1830) 73
Bodmin Justices (1946) .. 35, 81, 85, 126
Bond (1906) 73
Brown *v.* Crawshaw (1614) .. 97

Carpenter (1911) 21, 23
Castro (1879); on appeal (1883) 210, 213
Chadwick (1932) 205
Cohen & Bateman (1909) 208
Cole (1941) 193, 196
Cooke (1858) 173
Cowell (1940) 205
Coyne (1905) 21, 23

Davis (1943) 10
Dossi (1918) 173
Dublin (Dean and Chapter) (1724) 130
Dunne (1929) 60, 63–4

Errington (1922) 171

Fairbairn (1949) 65, 66, 70–1
Frailey *v.* Charlton (1919) 222–3
Frazer (1923) 171

Garrett (1853) 173
Gee & others (1936) 199–201
Grant (1937) 113, 124, 233. 253–4

Haddy (1944) 146, 149
Hammond (1941) 196
Hay *v.* Tower Justices (1890) 98
Hornby & Peaple (1946) .. 135, 136
Hughes (1927) 171

PAGE

Jennings (1949) 171
Jones (William) (1929) 225. 226

Kakelo (1923) 244
Kenworthy (1823) 121, 129, 130
Kilham (1870) 173

Ledwith *v.* Roberts (1937) .. 65, 66, 69–71

McNaughton (1843) .. 87, 93, 94
Makin *v.* Att.-Gen. for New South Wales (1893) 73
Marston (1918) 173
Mellor (1858) 96, 98, 105
Moland (1843) 180
Morriss (1926) 214

Neal (1949) 81, 85, 249

Pender *v.* Herle (1725) 130

Ras Behari Lal *v.* The King (1933) 99, 105
Riley (1853) 55, 58–9
Ruse *v.* Read (1949) 55, 58–9

Sheridan (1937) 113, 124, 233, 253–4
Sowerby (1894) 107
Sutton (1828) 96, 99, 104

Treanor (1939) 138–45
Tremearne (1826) 96, 104, 105
Turner (1910) 43
Tuttle (1929) 171

Wakefield (1918) .. 96, 98, 99, 105
West & others (1948) 173
Willesden Justices; *Ex parte* Utley (1948) 122, 128
Willmont (1914) 33, 81

Digitized by the Internet Archive
in 2026

https://archive.org/details/criminal-appeal-reports_1949-1950_34

TABLE OF STATUTES

PAGE

1604. 2 Jac. 1, c. 11 ..... 140, 143
1689. 1 Will. & M., sess. 2, c. 2 (Bill of Rights) 213
1823. 4 Geo. 4, c. 48 (Judgment of Death Act) 106
1824. 4 Geo. 4, c. 83 (Vagrancy Act), s. 4 ..... 65, 67–71, 184–7
1825. 6 Geo. 4, c. 50 (Juries Act), s. 3 (rep.) 100, 106
1828. 9 Geo. 4, c. 31 (Offences against the Person Act), s. 22 (rep.) 140, 143
9 Geo. 4, c. 32 (Civil Rights of Convicts Act), s. 3 .. 95, 96, 97. 103
1848. 11 & 12 Vict. c. 42 (Indictable Offences Act) 129
s. 17 ..... 199, 200
1861. 24 & 25 Vict. c. 96 (Larceny Act), s. 46 ..... 96, 101
24 & 25 Vict. c. 100 (Offences against the Person Act).... 229
s. 57 .....138, 140, 143, 144
1869. 32 & 33 Vict. c. 62 (Debtors Act) 21, 22
1870. 33 & 34 Vict. c. 23 (Forfeiture Act), s. 1 ..... 95, 96, 98, 102
33 & 34 Vict. c. 77 (Juries Act), s. 10 95–102
1871. 34 & 35 Vict. c. 65 (Juries (Ireland) Act), s. 7 98
34 & 35 Vict. c. 112 (Prevention of Crimes Act), s. 15 .... 65–8, 184–7, 190
1876. 39 & 40 Vict. c. 36 (Customs Consolidation Act)..... 242
s. 186 ..... 217, 222–3, 239
s. 259 239
1879. 42 & 43 Vict. c. 49 (Summary Jurisdiction Act), s. 17 123
s. 53 ... 217–8
1883. 46 & 47 Vict. c. 38 (Trial of Lunatics Act), s. 2 ..... 87, 93
1885. 48 & 49 Vict. c. 69 (Criminal Law Amendment Act) 214
s. 11 135
1891. 54 & 55 Vict. c. 69 (Penal Servitude Act), s. 1 (2) 213
s. 7 67
1906. 6 Edw. 7, c. 34 (Prevention of Corruption Act), s. 1 112–5
s. 2 (1) .. 112, 115
s. 2 (5) .. 115
1907. 7 Edw. 7, c. 17 (Probation of Offenders Act) (rep.), s. 1 (2) .. 225
7 Edw. 7, c. 23 (Criminal Appeal Act),
s. 4 (1) 34, 146
s. 19 (a) 146, 147
s. 21 225
1908. 8 Edw. 7, c. 59 (Prevention of Crime Act) (rep.) 137, 157
1914. 4 & 5 Geo. 5, c. 59 (Bankruptcy Act),
s. 154 (9) 120, 121, 125, 127
s. 155 (a) 21, 22
s. 156 (a) 36, 39–41
1915. 5 & 6 Geo. 6, c. 50 (Indictments Act),
s. 3 (2) 107, 108
s. 5 (1) 168, 171, 175–6
Sched. I 107, 108

PAGE

1916. 6 & 7 Geo. 5, c. 50 (Larceny Act),
s. 28 (4) 1, 2
s. 32 ..... 39, 168, 171, 182
s. 44 (3) 171
s. 44 (4) 171
1922. 12 & 13 Geo. 5, c. 11 (Juries Act), s. 1 ..... 95, 103
s. 2 .....95, 96, 99, 103
s. 8 (2) 103
12 & 13 Geo. 5, c. 56 (Criminal Law Amendment Act), s. 1 140
1925. 15 & 16 Geo. 5, c. 86 (Criminal Justice Act), s. 24 124
Sched. .. 120, 121. 123
1926. 16 & 17 Geo. 5, c. 7 (Bankruptcy (Amendment) Act) 21
16 & 17 Geo. 5, c. 58 (Penal Servitude Act) (rep.) 214
1930. 20 & 21 Geo. 5, c. 32 (Poor Prisoners' Defence Act) 147
1933. 23 Geo. 5, c. 12 (Children and Young Persons Act), s. 38 (1) 63
1935. 25 & 26 Geo. 5, c. 24 (Finance Act), s. 15 ..... 211, 217–8
25 & 26 Geo. 5, c. 46 Money Payments (Justices' Procedure Act) 228
1937. 1 Edw. 8 & 1 Geo. 6, c. 12 (Firearms Act), s. 23 (2) .. 65, 67, 185
Sched. III .. 65, 67, 185
1938. 1 & 2 Geo. 6, c. 63 (Administration of Justice (Miscellaneous Provisions) Act), s. 12 ..... 96–8, 101–2
s. 20 (3) 95, 97, 98. 101–2
1943. 6 & 7 Geo. 6, c. 28 (Finance Act) 218
1948. 11 & 12 Geo. 6, c. 58 (Criminal Justice Act),
s. 3 (1) 224–8
s. 3 (3) 227, 234
s. 3 (4) 227
s. 3 (5) 227, 229
s. 6 (4) (b) 226
s. 8 (5) 285
s. 11 (2) 224–8
s. 11 (3) 228
s. 12 (1) 184, 186, 187, 191
s. 13 ..... 224, 228–30
s. 21 (1) (2) 3, 5, 18, 25, 29, 31, 42, 117, 156, 163, 203, 236
s. 21 (5) 13
s. 22 ..... 9, 11, 24–9, 42, 231, 232
s. 23 ..... 9–11, 18, 42, 231, 232, 234
s. 28 (1) 120, 121, 123, 125, 127
s. 28 (2) 120, 121, 123–5, 127
s. 29 (1) 112–4, 120–4, 132, 150, 163, 220–1, 231, 251–3
s. 29 (3) 112, 113, 230, 233, 234
s. 29 (5) 231
s. 79 146
s. 80 (2) 18–20
Sched. IX 146

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE LYNSKEY.

JOHN HENRY PARKIN.

1949.
Oct. 14.

Being Found by Night in a Building—Prisoner seen on Piping at Side of Building—Larceny Act, 1916 (*6 & 7 Geo. 5, c. 50*), *s.* 28 (4).

By section 28 of the Larceny Act, 1916 : "Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanour . . .".

The appellant was found by night half-way up some piping at the side of a building, and he appeared to the police officer who saw him to have one of his hands through a window for the purpose of pulling himself into the building.

Held, that the language of the section must be given its ordinary meaning, and that as the appellant had been found not *in* the building, but outside trying to get into it, he was not guilty of an offence against the above-mentioned sub-section.

Appeal against conviction.

The appellant was convicted at West Kent Quarter Sessions on September 1, 1949, of being found by night in a building with intent to steal, contrary to section 28 (4) of the Larceny Act, 1916, and was sentenced by the Chairman to four months' imprisonment.

A police officer, who was passing near a cinema shortly after midnight on the night of July 16–17, 1949, saw the appellant half-way up some piping at the side of the building with his foot on the junction of the pipe and his head and shoulders near a window. The police officer could not see clearly, but it appeared to him that the appellant had one of his hands through the window for the purpose of pulling himself into the building.

1949.
Oct. 14.

JOHN HENRY PARKIN.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

W. I. Percival, for the appellant:

Even if the appellant was guilty of some other offence, he was not guilty of the offence charged, because he was not in the building, but outside it, for the purposes of section 28 (4) of the Larceny Act, 1916.

Maxwell Turner, for the Crown:

If the police officer was correct in his view, the appellant had one arm through the window when he was seen. That would be a sufficient entry to constitute the offence of breaking and entering, and it is submitted that it is sufficient to render the appellant *in* the building for the purpose of section 28 (4) of the Larceny Act, 1916.

LYNSKEY, J.: The appellant was convicted at West Kent Quarter Sessions of being found by night in a building with intent to steal, contrary to section 28 (4) of the Larceny Act, 1916, and was sentenced by the Chairman to four months' imprisonment. He now appeals against conviction, and the basis of his appeal is that upon the facts, which were not in dispute, he was not found in any building with intent to commit any felony.

The circumstances are that shortly after midnight on the night of July 16, a police officer passing near a cinema saw the appellant half-way up some piping at the side of the building with his foot upon the junction of the pipe and his head and shoulders close to a Crittall window. In the police officer's opinion, though he could not see clearly, the appellant had one of his hands through the window for the purpose of gripping the sill and pulling himself into the building.

A submission was made on the appellant's behalf at the trial that on these facts he was not in the building for the purposes of the sub-section. The prosecution, on the other hand, said that if he had been charged with breaking and entering, the fact that he had one arm through the window would be a sufficient entry for the purposes of constituting the offence of breaking and entering.

We have to construe this sub-section according to its clear

words. The words are: "Every person who shall be found by night . . . in any building with intent to commit any felony therein; shall be guilty of a misdemeanour . . .". The question is what do those words "be found in any building" mean? One has to apply the ordinary English meaning, unless the context requires one to give them some unusual meaning. The ordinary meaning of the English words as applied to the circumstances of this case is that the appellant was not found *in* the building but was found outside the building, trying to get into it. In those circumstances, of whatever other offence he may have been guilty, he was not guilty of this particular offence with which he was charged, namely, being found in the building with intent to commit a felony. In those circumstances, the appeal will be allowed and the conviction quashed.

1949.
Oct. 14.

JOHN HENRY PARKIN.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

Conviction quashed.

Solicitor: Eric C. Weale, Maidstone, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CROOM-JOHNSON AND MR. JUSTICE LYNSKEY.

JOSEPH BARRETT.

1949.
Oct. 14, 18.

Sentence—Preventive Detention — Corrective Training — Principles Applicable—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

Preventive detention is not a substitute for the old sentence of penal servitude, and is not a sentence to be passed merely instead of the corresponding term of imprisonment. Such a sentence should be passed only in cases where the prisoner is a habitual criminal (using that term in a non-technical sense), and only where prolonged detention is necessary for the protection of

1949.
Oct. 14, 18.

JOSEPH BARRETT.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

the public. When a sentence of preventive detention is passed, it ought to be for a long period.

Corrective training is to be regarded as in the nature of extended Borstal treatment.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Liverpool Quarter Sessions on June 3, 1949, of attempted shopbreaking and of possessing housebreaking implements by night, and was sentenced by the Recorder to five years' preventive detention.

The applicant was thirty-six years of age, and had three previous convictions for shopbreaking and one for receiving stolen property. He had only recently come out of prison when he committed the offences charged. He had a good discharge as a seaman.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant was convicted before the learned Recorder of Liverpool of possessing housebreaking implements by night and attempted shopbreaking. He appeals against his conviction, and against a sentence of five years' preventive detention.

Very little need be said about the conviction, because the case is as clear a case as can be imagined. There was an attempt to break into the Abbey Hotel by the use of a jemmy, and at the same time a Post Office was broken into, a window was broken, and somebody got in, and took, among among things, a postman's cap. The sub-postmistress's dog gave the alarm, and when the police arrived the dog was found to be trying to jump over the wall which separated the postmistress's yard from the railway station. That gave the police a clue as to where the men had gone, and they went into the railway station and saw two men (one of whom was a co-prisoner of the present applicant, who does not appeal) running towards the waiting-room. The police followed them into the waiting-room and found them shamming sleep. They were panting very hard, which showed that they had been running, and

1949.
Oct. 14, 18.

JOSEPH BARRETT.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

the applicant was wearing the postman's cap. He was very properly convicted.

The applicant, who is thirty-six years of age, has four previous convictions, three for shopbreaking and one for receiving. His last sentence was in January, 1947, so that he was only just out of prison when he committed this offence. He had a good discharge as a seaman, and the learned Recorder said that he took that into account when he imposed a sentence of five years' preventive detention.

The Court desires to say a few words on preventive detention and corrective training. It does not appear to the Court that in a case where a sentence of five years' imprisonment would be an appropriate sentence, there is any good reason for imposing five years' preventive detention instead of five years' imprisonment. It is perfectly true that section 21 of the Criminal Justice Act, 1948, provides that " If the Court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision . . . the Court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the Court may determine ".

The object of the section is really to deal with habitual criminals, and to enable the Court in such cases to impose a term of detention longer than the term of imprisonment which would ordinarily be imposed. If a Court thinks that the proper length of time for which a prisoner should be detained is, say, five years, there does not seem any particular reason why the sentence should be one of five years' preventive detention instead of five years' imprisonment. I am emphasising that in this case, because in the opinion of the Court a sentence of five years was well justified. If there had been no such thing as preventive detention, the proper sentence would have been, or might have been, five years. If, however, the proper sentence of imprisonment in any case would be say, three years, but the prisoner's past record is such that it appears desirable that he should have a longer period of detention, then the case is a proper one

1949.
Oct. 14, 18.

JOSEPH BARRETT.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

for imposing preventive detention, perhaps for a considerable period, because it is, I think, well known that the rigours, if I may use the word, of preventive detention will not be so severe as the rigours of imprisonment, at any rate, for the whole period. Preventive detention, in the opinion of the Court, should be kept for those cases in which a Court thinks it is right, for the protection of the public, to detain a prisoner in custody for a longer period than it would feel justified in fixing, if the sentence were merely one of imprisonment.

Therefore, where the appropriate sentence would be four or five years' imprisonment, there does not seem any good reason for preventive detention, and if sentences of preventive detention are given so freely that Courts are really giving preventive detention instead of imprisonment in cases where a substantial sentence of imprisonment would in any case be deserved, the only effect will be that the places set apart for preventive detention will be filled up with prisoners who might just as well be dealt with at ordinary prisons.

Very much the same considerations apply to sentences of corrective training. Corrective training is intended for what I may call extended Borstal treatment. A person over the age of twenty-one can no longer be sent to Borstal training. If persons over the age of twenty-one, that is to say, of twenty-one years of age or over, are in need of training, as they can no longer be sent to Borstal, it is a very good thing, no doubt, that they should be sent to corrective training; and if the prisoner's record shows that his tendency is to lead a criminal life, it is just as well to make the sentence of corrective training of substantial length, and to bear in mind that the usual remission will be granted if the prisoner behaves himself. If a prisoner is to be sentenced to corrective training, it is not much use giving a sentence of a length which will not enable real reform to be attempted.

With regard to preventive detention, I say once more that it is desirable that Courts should remember that that sentence should be kept for cases where it is thought necessary in the interests of the public to give a sentence longer than the

1949.
Oct. 14, 18.

JOSEPH BARRETT.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

sentence of imprisonment which would be given. If in a particular case it is thought that a sentence of detention for five years is the correct sentence, and it is not necessary to detain the prisoner for longer than five years, there seems very little reason for putting him in preventive detention and not in prison.

The Court does not, however, think it necessary in the present case to alter the sentence of preventive detention to one of imprisonment; but we hope that these considerations will be borne in mind in future. The application for leave to appeal against conviction and sentence is therefore refused.

Application refused.

STATEMENT ON PREVENTIVE DETENTION

On October 18, THE LORD CHIEF JUSTICE said that he desired to make the following statement on preventive detention:

Since the beginning of these sittings we have had before us more than eighty cases including those in today's list. The majority have been appeals against sentence and in a substantial number the sentence passed has been one of preventive detention. A common sentence of this description has been one of five years and this Court feels that in many instances Courts are passing this class of sentence in cases where but for the substitution of imprisonment for penal servitude the sentence would have been penal servitude for the same number of years. We think it right to emphasise that in our opinion it was not the intention of the Act to substitute preventive detention for the old sentence of penal servitude. If a Court is of opinion that a given number of years is the appropriate sentence, it does not by any means follow that because the prisoner has the requisite number of previous convictions the sentence should be one of preventive detention rather than imprisonment; still less does this follow because of a report from the Prison Commissioners that the prisoner is suitable for this form

1949.
Oct. 14, 18.

JOSEPH BARRETT.

Goddard, L.C.J., Croom-Johnson, J., Lynskey, J.

of sentence. Their report is merely as to his suitability if the Court deems it right to pass such a sentence. We have already said [see BARRETT, *ante*] that preventive detention ought to be awarded only in cases where the prisoner is an habitual criminal, though I desire to say that he need not be an habitual criminal in the technical sense which decisions under the former Act gave to that expression. Before the Act it will be remembered that, as in such a case at least three years' penal servitude had first to be given, the total length of detention would have been at least eight years. Preventive detention ought to be passed only where prolonged detention is necessary for the protection of the public. It may well be that when a sentence of five years' imprisonment would ordinarily be passed the Court may consider that the particular circumstances require an additional term because of the criminal proclivities of the offender and so give seven or ten or even more years' preventive detention. Possibly if a sentence of two or three years would ordinarily be regarded as appropriate, preventive detention for five years might in some cases be deemed justifiable; but the Court is of opinion that preventive detention should be regarded as an exceptional sentence and not one to be given merely in lieu of imprisonment. Where it is given, it ought to be for a long period. As a rule five years would only be appropriate in the case of a man of advanced age who habitually commits crime, it may be of a petty nature, who must therefore be kept in custody, but who it may be hoped will not end his life in prison. There have been very few cases of this nature before the Court in which they have disapproved of the length of sentence, but several in which, in their opinion, it should have been ordinary imprisonment and not preventive detention. If the latter sentences continue to be given at the present rate, it would seem that the Prison Commissioners may be put into difficulties in finding the requisite accommodation in the places set aside for this form of detention.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE LYNSKEY.

R. v. ROBERT DICKSON.

1949. Oct. 31.

Sentence—Preventive Detention—Corrective Training—Procedure to be Followed at Trial—Procedure with regard to Indictment—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21, 22, 23.

Where the question arises of the eligibility of a prisoner for corrective training or preventive detention or for his being ordered to be subject to the provisions of section 22 of the Criminal Justice Act, 1948, with regard to supervision after discharge, the procedure to be observed is as follows. After a plea of Guilty has been made or a verdict of Guilty returned, counsel for the prosecution should call a police officer to prove that he has served on the prisoner and on the Court a notice as provided by section 23 of the Act at least three days before trial. Then the Clerk of Assize or the Clerk of the Peace, as the case may be, should put the contents of that notice to the prisoner and obtain in open Court his admission or denial of the previous convictions alleged therein. If the prisoner admits the convictions, a copy of the Prison Commissioners' report should then be served on the prisoner or his counsel.

With regard to the indictment in such cases one of two courses should be adopted; either an averment of the previous convictions contained in the notice should be included in the indictment, or else the notice must be attached to the indictment.

Appeal against sentence.

The appellant pleaded guilty at Bristol Assizes on June 27, 1949, to office breaking and larceny, and to receiving stolen property, and was sentenced by Lewis, J., to ten years' preventive detention.

No evidence was given at the trial that the notice of previous convictions which it was intended to prove against the appellant for the purpose of his being qualified for preventive detention had been served on the prisoner, nor was the prisoner asked in open Court whether he admitted those convictions. A

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

notice containing an admission, which purported to be signed by the appellant, was before the Judge.

James Burge, for the appellant:

As the provisions of section 23 of the Criminal Justice Act, 1948, were not complied with, it is submitted that the sentence of preventive detention cannot stand. The service of the notice on the prisoner should have been proved and he should have been specifically asked in open Court whether he admitted the convictions contained in the notice. [He referred to DAVIS (1943), 29 Cr. App. R. 35; [1943] K. B. 274.]

E. S. Fay, for the Crown:

It is conceded that the irregularities referred to occurred, and the Court may find it necessary to exercise its powers of substituting an appropriate sentence of imprisonment.

THE LORD CHIEF JUSTICE: The Criminal Justice Act, 1948, made several very definite changes in the criminal law and, among other things, provided for two new sentences being imposed instead of the previous sentences either of imprisonment or penal servitude. Penal servitude was abolished as a sentence because the discipline in prisons was no different in the case of penal servitude from that in the case of imprisonment, and therefore all sentences which would have been either sentences of imprisonment with hard labour, or sentences of penal servitude, were done away with and a sentence of imprisonment was substituted.

There were also two new forms of sentence provided, one that can be passed on a prisoner who is not less than twenty-one and has been convicted since he attained the age of seventeen on at least two previous occasions of an offence punishable with imprisonment for a term of two years or more, and who is then convicted of an offence punishable with a sentence of two years or more. He can be sent to corrective training for a period of from two to four years.

In the case of a prisoner of not less than thirty years of age who is convicted on indictment of an offence punishable with

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

imprisonment for two years or more and who has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training, a sentence of preventive detention for a term of not less than five or more than fourteen years can be imposed.

On the last occasion on which this Court sat [see *ante*, p. 7], we made some observations with regard to the classes of case which were suitable for preventive detention. I need not repeat what I said on that occasion. The statement which I made has been reported, and it is to be hoped that Courts will follow the considered opinion of this Court as embodied in that statement.

There is also another section which has to be borne in mind, that is to say section 22, which provides that " Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section ".

There is also another section, section 23, which says that " For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section, no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the Court at least three days before the trial that it is intended to prove the conviction

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury". It is perfectly true that that section does not provide that the admission must be made in Court. It contemplates a notice being served on the prisoner three days before the trial, and then it provides that, unless the conviction is admitted, the question must be determined by a jury.

Those provisions to some extent complicate what used to be the simple procedure of the Court in sentencing a prisoner, and there are so many things now that have to be borne in mind that it is not surprising if, occasionally, some point is overlooked, or the Court's mind is diverted from the really important thing so far as the prisoner is concerned, which is considering the appropriate sentence; but, of course, it is the duty of Courts to follow the section strictly.

The question which arises in this case is one of a highly technical nature. The appellant pleaded Guilty to two offences of a very, very serious character, and there is no question at all that he is just the sort of man whose previous history indicates that he was a very proper subject for a long term of preventive detention.

The point that is taken on his behalf is that the procedure which ought to be followed was not in fact followed. What happened was that, in accordance with the practice which has been standardised, apparently, as police practice (I think at the suggestion of the Home Office), a notice of the convictions which it was proposed to prove against him for the purpose of his qualifying for the sentence of preventive detention was served on him with the three previous convictions mentioned set out, and the appellant signed an admission at the bottom that he admitted the previous convictions. There is not the smallest doubt that he did sign it; the Court has seen the document and has compared the signature with the signature on a statement that was put to the prisoner during the course of the trial and which he signed.

Unfortunately, evidence was not given at the trial that the

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

notice had been served and the prisoner was not asked the definite question whether he admitted these three previous convictions. The learned Judge did ask the police officer whether the provisions of section 21 (5) had been complied with. That subsection provides that " A copy of any report or representations in writing made to the Court by the Prison Commissioners for the purposes of the last foregoing subsection shall be given by the Court to the offender or his counsel or solicitor ". That is another thing which has to be borne in mind. The Court, before it sentences a prisoner to corrective training or preventive detention, is told to consider any report or representations which may be made to the Court by the Prison Commissioners on the defendant's physical and mental condition and suitability for such a sentence. It is not clear to me or to any of His Majesty's Judges why it is necessary to serve that report on the prisoner. In some cases I think it is very undesirable, because it may sometimes give him ideas about his mental condition which he perhaps should not know. However, Parliament has made that provision, and it is for us to abide by it. There are, therefore, three things that have to be done: there is the proof of the notice, the proof of the admission by the prisoner, and the serving of the Prison Commissioners' report.

The Court finds that the only thing that was said in Court was that the Prison Commissioners' report had been served on the prisoner. The learned Judge, no doubt having before him the statement which had been served on the prisoner regarding previous convictions and his signature at the bottom admitting the convictions, probably thought that was enough, forgetting for the moment that, strictly speaking, it ought to have been proved that it was his signature. The Court thinks this is a good opportunity for stating what, in its opinion, is the proper procedure to be adopted by all Courts in regard to proving these matters which qualify a prisoner to receive a sentence of corrective training or preventive detention.

After a plea or verdict of Guilty has been returned, a police officer should be called by counsel for the prosecution and the

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

officer should prove that he has served a notice on the prisoner as provided by the Act three days before the trial. When that has been proved, the Clerk of Assize or the Clerk of the Peace, as the case may be, should then put the contents of that notice to the prisoner and get in open Court, his admission or his denial—but generally speaking, it will be an admission—that he has had those three previous convictions. Then there must be handed to the prisoner or to his counsel a copy of the Prison Commissioners' report. The proceedings will then be in order.

It may be that the prisoner will have signed the admission on the form to which I have referred or he may say, when he comes into Court, that he disputes one of the convictions and wishes to withdraw the admission. If so, the Judge who is presiding at the trial will, no doubt, consider what is to be done in that case, because it may happen, that this takes place on the last day of an assize. It appears to the Court at the moment that the object of serving the prisoner with the notice three days before the trial is to give him an opportunity of saying that he disputes a particular conviction; and then the matter can be dealt with by getting the proper evidence, which is, of course, a copy of the conviction and proof of identity by a police officer who can speak to the identity of the prisoner.

We do not say, and had better not say, as the point does not arise in this case, what is to happen if a prisoner seeks to withdraw an admission which he has previously made. But we are saying that the procedure which I have outlined, namely, proof by the police that the notice has been served; then the putting of the convictions contained in the notice to the prisoner and getting his admission or denial of those convictions; and thirdly, the handing to him or his counsel of the report of the Prison Commissioners, ought to be followed in every case.

In this case we feel obliged to set aside the sentence of preventive detention, because we cannot find that the prisoner was ever asked in Court whether he admitted the convictions or not, nor indeed, was there any evidence given that the notice had in fact been served. As I say, it is purely a technical

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

point, because no one has the least doubt that it was served and that he did admit the convictions. If, therefore, the sentence of preventive detention has to be set aside, the question is, what sentence should be substituted for it? This was an extremely bad case. A daring robbery was committed at the Post Office at Blandford in Dorset, and a very large amount of property was stolen. The appellant very soon after the robbery was dealing with part of the property that was stolen. There was no evidence that he actually had been a party to the breaking and entering of the premises, but I do not suppose anybody who has read this case would have much doubt that he must have been privy to it in some way.

Be that as it may, he was convicted of receiving property, a part of that robbery, for which he himself had got to pay another man concerned in it £1.000. If one finds that stolen property is being valued between thief and receiver at £1,000, one knows perfectly well that the real value of that property must be much more. In addition to that, he pleaded guilty to breaking into the offices of the County Council of the Isle of Ely and stealing from there property which has great significance in these days: what he stole was blank motor-car registration books and rubber stamps and so forth, which could be used for making forged registration books and putting them out on the market, in such a way, of course, as to facilitate the market in stolen cars which is rife at the present time. In addition, he stole a great many petrol coupons.

His character and previous convictions I will briefly refer to:—He is American by birth, but unfortunately he came to this country a long time ago, and his criminal record begins, so far as proved, on October 16, 1933, when he received a very light sentence at Liverpool Assizes for shopbreaking, larceny, housebreaking, and possessing housebreaking implements by night, four offences of shopbreaking and two of office breaking and larceny being taken into consideration; he was then sentenced to eight months' imprisonment. That was his first conviction. Then in 1934, just after he came out from prison, at the County of London Sessions in the month of June he

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

got eighteen months for burglary and stealing jewellery and receiving stolen property. In 1936, again very soon after he came out, he received a sentence of two years' imprisonment with hard labour for burglary and stealing. There were a number of different cases, but I need not go right through them. On January 6, 1938, at West Sussex Quarter Sessions he was sentenced to three years' penal servitude for garage breaking, stealing a car, housebreaking and stealing plate, etc., and possessing housebreaking implements by night. In February, 1938, on summary conviction, he got twelve months in all (six and six months to run consecutively) for receiving stolen property and stealing property of the value of £378 from a dwelling-house. In June, 1940, at the Central Criminal Court he was sentenced to two years' imprisonment and his licence was forfeited for stealing jewellery value £470, from a dwelling-house. On July 2, 1942, at Middlesex Sessions he got three years' penal servitude for receiving stolen property, of which there were four cases, and two more were taken into consideration. It is quite obvious he ought to have had a longer sentence. In 1946, on July 30, at Bucks. Quarter Sessions he was sentenced to eighteen months' imprisonment for receiving stolen postage stamps worth £1,000 and for assaulting the police—again, a somewhat lenient sentence, considering his record.

It is true to say that he has not been arrested for any offence between July, 1947, which was about the time when he came out of prison, and the time when he committed this offence. However, as we said the other day, preventive detention is meant to be a longer sentence than would be passed if imprisonment were ordered. If the Court is satisfied, for instance, that a sentence of five years' imprisonment is the right sentence, there is no point in giving five years' preventive detention, and in fact, preventive detention should only be given where the Court is of opinion that a long period of detention is necessary. It is most unfortunate that we have felt obliged in this case, for the reasons I have given, to set aside this sentence of ten years' preventive detention, but there must, at any rate,

1949.
Oct. 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

be a substantial sentence, and the Court has come to the conclusion that a sentence of seven years' imprisonment must be substituted.

I now want to add one word more with regard to the somewhat troublesome matter of the procedure to be followed in these cases. The Judges of the Court of Criminal Appeal, that is to say, all the Judges of the King's Bench Division, have considered this matter, and, as I notified the Clerks of Assize and Clerks of the Peace, they have come to the conclusion, because of the mistakes or omissions which we have found to take place in these cases, that it would be desirable, although it is not required by law, to put an averment in the indictment of these previous convictions so that the Court's attention may be carefully directed to it. However, it has been pointed out to us by various Clerks of Assize and Clerks of the Peace that that may cause difficulty because, especially at a heavy assize or heavy quarter sessions, when the indictments are drawn, it is not always known that the police are going to put forward previous convictions with a view to getting the prisoner qualified for one these new sentences.

The Court is of opinion, therefore, that one of two courses can be taken: either an averment should be put in the indictment in the form which the Judges have suggested, or (as has been done in this case) the notice which is served on the prisoner should be attached to the indictment. That was done in this case, and has, I now find, been done on other circuits and at other quarter sessions. If that is done, it will be a sufficient record, although it is necessary, of course, that proof should be given that the notice was served, and above all, it should be borne in mind that the convictions must be put to the prisoner in open Court. Therefore, in future, it will be open to Clerks of Assize and Clerks of the Peace either to include the averment in the indictment, or, if they find it more convenient, to attach the notice to the indictment; and it must be attached to the indictment, so that if the case comes up to his Court we shall have copies before us. Above all, it must be ensured that

1949. *Oct.* 31.

ROBERT DICKSON.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

the prisoner is asked the question in open Court whether he admits the convictions or not.

Sentence varied.

Solicitors: Freeborough & Co., for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE LYNSKEY.

1949. *Oct.* 31.

MARTIN CHRISTOPHER MURPHY.

Sentence—Corrective Training—Preventive Detention—Qualifying Convictions — Conviction in Northern Ireland or Foreign Country — Conviction in Scotland — Conviction before Court Martial—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21 (1) (2), 80 (2).

By section 80 (2) of the Criminal Justice Act, 1948: " . . . any reference [in the Act] to a previous conviction or sentence shall be construed as a reference to a previous conviction by a Court in any part of Great Britain and to a previous sentence passed by any such Court ".

As Northern Ireland, though part of the United Kingdom, is not part of Great Britain, a previous conviction in Northern Ireland cannot be relied on as qualifying a prisoner for preventive detention or corrective training; neither can a conviction in any dominion, colony or foreign country; nor a conviction before a court martial. By virtue of the above sub-section, however, a conviction in Scotland can be relied on.

Appeal against conviction and sentence.

The appellant was convicted at Cambridge Borough Quarter Sessions on July 29, 1949, of garage-breaking and larceny and was sentenced by the Recorder to four years' imprisonment.

In the notice served on the appellant under section 23 of the Criminal Justice Act, 1948, with a view to qualifying the appellant for preventive detention, one of the convictions set out was a conviction in Northern Ireland. The Recorder held

1949.
Oct. 31.

MARTIN CHRISTOPHER MURPHY.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

that he was not entitled to take that conviction into account, and that accordingly he could not pass a sentence of preventive detention.

Donald C. Bain, for the appellant.
Anthony Hawke, and *E. Garth Moore*, for the Crown.

THE LORD CHIEF JUSTICE: The appellant applied for leave to appeal against conviction and sentence. His conviction was before the learned Recorder of Cambridge for garage-breaking and larceny. He had at least twenty previous convictions and would therefore have been a proper subject for preventive detention, if his previous convictions alleged could have been reconciled with the provisions of the statute, because it is obvious that he is a public danger.

One of the convictions in the notice served on the appellant was a conviction in Northern Ireland, and the learned Recorder came to the conclusion that he could not deal with the appellant as a proper subject for preventive detention because he was not entitled to take into account a conviction in Northern Ireland. He accordingly sentenced him to four years' imprisonment. If he could have given preventive detention, no doubt he would have given him a longer sentence. There is nothing in his appeal against conviction, and in the circumstances, the sentence of four years' imprisonment cannot be, for a man of his character, considered excessive. Therefore the appeal fails.

The reason why the Court gave leave to appeal was because the learned Recorder not only said that he could not take into account a conviction in Northern Ireland as one of the convictions which would qualify a man for preventive detention, or, for that matter, corrective training, but he also *per incuriam* said that the same would apply to Scotland. In saying that the same would apply to Scotland, the learned Recorder had not had his attention called to section 80 (2) of the Criminal Justice Act, 1948, which provides: " . . . and any such reference to a previous conviction or sentence shall be construed as a reference to a previous conviction by a Court in any part of

1949. *Oct.* 31.

MARTIN CHRISTOPHER MURPHY.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

Great Britain and to a previous sentence passed by any such Court ".

Northern Ireland is not part of Great Britain. It is part of the United Kingdom, and the United Kingdom consists of Great Britain and Northern Ireland. The combined kingdoms of England and Scotland were so designated in the Act of Union passed in the reign of Queen Anne, and ever since then the two kingdoms of England and Scotland have been known as Great Britain. The United Kingdom was first brought into being when the Act of Union with Ireland was passed in the year 1800. Therefore it appears that, for the purpose of the previous convictions which it is necessary to prove, reliance cannot be placed on a conviction in Northern Ireland.

The Court has no doubt that a conviction and sentence in Scotland can be relied on by reason of section 80 (2). If the conviction has taken place in Scotland, it is obviously meant by sub-section (2) of section 80 that the conviction in Scotland should be provable in England.

For these reasons we dismiss this appeal. We really only granted the application to enable this Court to point out this difference with regard to Scotland and Northern Ireland. A conviction in Ireland cannot be relied on any more than a conviction in South Africa or one of the other dominions or colonies or a foreign country. It is also perhaps worth mentioning, because I know the point has been raised, that a conviction before a court martial cannot be relied on for this purpose.

The appellant will get the advantage of not being sent to preventive detention for five years because of this difficulty, and also, as he was given leave to appeal, the time during which he has awaited the appeal in custody will count towards sentence.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE LYNSKEY.

CHARLES LEWIS PRYCE.

1949. *Oct.* 31.

Bankruptcy Offence—Obtaining Credit—Money Advanced by Way of Loan—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *as amended by the Bankruptcy (Amendment) Act*, 1926 (*16 & 17 Geo. 5, c. 7*), *s.* 155 (a).

Obtaining a sum of money by way of loan amounts to obtaining credit within section 155 (*a*) of the Bankruptcy Act, 1914, or section 13 of the Debtors Act, 1869.

CARPENTER (1911), 22 Cox C. C. 618, followed.

COYNE (1905), 69 J. P. 151, distinguished.

Appeal against conviction (on certificate).

The appellant was convicted at Bournemouth Quarter Sessions on four charges of obtaining credit without disclosing that he was an undischarged bankrupt and was sentenced by the Assistant-Recorder to concurrent terms of two years' imprisonment.

The appellant had obtained substantial sums of money from several persons by way of loan. At the trial it was submitted by defending counsel that this did not amount to the obtaining of " credit " within section 155 (*a*) of the Bankruptcy Act, 1914 (as amended). The Assistant-Recorder overruled the submission but after conviction gave a certificate for appeal.

No counsel appeared for the appellant.

Seymour Collins, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was charged before the learned Assistant-Recorder of Bournemouth on an indictment containing four counts charging him with obtaining credit without disclosing that he was an undischarged bankrupt. The appellant is a man who for years, as his previous convictions show, has been living by fraud, and principally the well-known

1949.
Oct. 31.

CHARLES LEWIS PRYCE.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

fraud generally known as the directory fraud, that is to say, pretending that he is compiling street directories and getting money out of people with promises of employment and so forth, when in fact he had no business at all.

The appellant was previously before the Hampshire Quarter Sessions on precisely the same class of case, and on that occasion counsel on his behalf took the objection that what the appellant obtained was cash and not credit and the Bankruptcy Act, 1914, did not refer to obtaining cash. The learned Chairman, in our opinion wrongly, ruled that that was an answer to the case so far as obtaining credit was concerned. The appellant was on that occasion convicted of obtaining money by false pretences, and when he appealed against his conviction, we had to quash it on the ground of misdirection, but I did, in giving the judgment of the Court, use words to the effect that the Court did not agree with the view which the Chairman had taken. We could not deal with it, because the appellant had been acquitted on that part of the case by direction of the Chairman, and we do not entertain appeals against acquittals.

The appellant then apparently went back to Bournemouth, continued to do what he had done before, and was there arrested. Before the Assistant-Recorder the same point was again taken, and the Assistant-Recorder, in our view quite properly, overruled that contention. The evidence showed that the appellant had got large sums of money from two or three different people on loan. If a man contracts a loan, of course he is getting credit. He gets a loan on a promise to repay, on which he can be sued, and he is getting credit. There is no difference between getting money and getting goods from that point of view. It is perfectly clear that if a man contracts a loan either by fraud or without disclosing that he is an undischarged bankrupt, he is obtaining credit. If he is charged under the Debtors Act, 1869, with obtaining credit by fraud, he is liable to be convicted of that. If he is charged under the Bankruptcy Act, 1914, with obtaining credit without disclosing that he is a bankrupt, he can be convicted of that.

1949.
Oct. 31.

CHARLES LEWIS PRYCE.

Goddard, L.C.J., Hilbery, J., Lynskey, J.

Two cases were cited to the learned Assistant-Recorder. The first was COYNE (1905), 69 J. P. 151. Apparently counsel relied on its quotation in *Archbold's Criminal Pleading, etc.* (32nd ed.), at p. 1312, as authority for the proposition that, if a man obtains cash, he cannot be convicted of that offence, because he is obtaining cash and not credit. It is perfectly true that the learned Recorder of London (Sir Forrest Fulton) said: "It is quite clear that in this case the prisoner obtained money and not credit". On the facts of that particular case there is no doubt that the Recorder was right, because the facts were that the prisoner had induced parents of boys to bind their boys as apprentices to him and took £25 from each parent by way of premium. The premiums were not returnable by the prisoner therefore no credit was obtained. The prisoner got money, but there was no promise to return the money; it is not a loan. In this case the sums obtained were loans. The second case, and the one on which the Assistant-Recorder acted, was CARPENTER (1911), 22 Cox C. C. 618, where Channell, J., said at p. 622: "For instance, you know he"—that is, the prisoner —"got the money on loan. Now, that being so, of course he got credit, but it does not prevent the charge being established of obtaining money by false pretences". The learned Judge was saying that, because the prisoner got credit, it did not follow that he might not also be charged with false pretences.

There is nothing in this point at all. The appellant obtained the sums in this case on loan, and thereby he obtained credit from the persons who were unfortunate enough to advance the money. The appeal against conviction, therefore, is dismissed. It is not surprising that there is no appeal against sentence.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BIRKETT.

1949.
Nov. 7.

PETER PATRICK SPEAKMAN.

Sentence—Supervision after Discharge—Applicable only where Sentence One of Imprisonment—Not Applicable to Sentence of Corrective Training—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 21, 22 (1).

By section 22 (1) of the Criminal Justice Act, 1948: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section [relating to supervision after discharge]".

The above subsection applies only where a sentence of imprisonment for twelve months or more is passed, and does not apply where the sentence passed is one of corrective training.

Appeal against sentence.

The appellant pleaded guilty at Winchester City Quarter Sessions on July 29, 1949, to housebreaking and larceny and was sentenced by the Recorder to three years' corrective training. No order under section 22 (1) of the Criminal Justice Act, 1948, providing for supervision after discharge, was made.

No counsel appeared.

THE LORD CHIEF JUSTICE: The appellant pleaded Guilty before the learned Recorder of Winchester to breaking and entering a Soldiers' Home at Aldershot and stealing money

1949.
Nov. 7.

PETER PATRICK SPEAKMAN.

Goddard, L.C.J., Hilbery, J., Birkett, J.

therein. He was one of the persons liable to be dealt with under section 21 of the Criminal Justice Act, 1948, that is to say, a prisoner over seventeen years of age with two previous convictions, the previous convictions having been admitted by him and proper notice having been given.

He was convicted at Manchester Assizes of larceny and bigamy, ten cases of larceny being taken into consideration, on February 22, 1945, when he received twelve months' and three months' imprisonment (consecutive). In August, 1947, at Bow Street Magistrates' Court he was convicted of receiving stolen cash, one case of larceny in a dwelling-house being taken into consideration, and received six months' imprisonment. On December 16, 1947, at Liverpool City Magistrates' Court for stealing (two cases), one other offence being taken into consideration, he was sentenced to one day's imprisonment consecutive to the previous sentence. He was already then in custody. Then, at Kent Assizes, in February, 1948, for bigamy he received eighteen months' imprisonment, and on March 22, 1948, at Knutsford Quarter Sessions for housebreaking and larceny he was sentenced to twenty months' imprisonment, to run concurrently with his previous sentence.

It is therefore quite clear that the appellant is eminently qualified for a period of corrective training, and there is no reason to interfere with the sentence of three years' corrective training which the learned Recorder passed. But, in passing sentence, the learned Recorder refrained from making an order under section 22 of the Act. Section 22 (1) provides that: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of

1949. *Nov.* 7.

PETER PATRICK SPEAKMAN.

Goddard, L.C.J., Hilbery, J., Birkett, J.

twelve months from his next discharge from prison be subject to the provisions of this section".

The Court gave leave to appeal because they desired to consider the question whether or not this was a case in which an order under section 22 should be made. We think that in this case the learned Recorder was right not to make an order under section 22 for this reason, that section 22 only applies if the Court sentences a prisoner to a term of imprisonment of twelve months or more, and imprisonment and corrective training are alternative sentences. A prisoner who is sentenced to corrective training automatically comes under the provisions of the Third Schedule to the Act, which deals with the release on licence of persons sentenced to corrective training or preventive detention, but he does not come under the provisions of section 22. Accordingly, there is no reason to alter the sentence of the learned Recorder by making an order under section 22, and the sentence which was passed upon the appellant must stand. The appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BIRKETT.

1949. *Nov.* 7.

WILLIAM GEORGE KEELER.

Sentence—Supervision After Discharge—Order to be Made Unless Special Reasons Exist—Special Reasons where they Exist to be Stated—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 22 (1).

By section 22 (1) of the Criminal Justice Act, 1948: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to

1949.
Nov. 7.

WILLIAM GEORGE KEELER.

Goddard, L.C.J., Hilbery, J., Birkett, J.

Borstal training or imprisonment; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of the section [relating to supervision after discharge] ".

The provisions of the above sub-section are mandatory, and where the circumstances therein set out exist, it is the duty of the Court to make an order under the sub-section unless special reasons to the contrary exist. Where special reasons do exist, they should be stated by the Court.

Appeal against sentence.

The applicant was convicted at West Kent Quarter Sessions on August 29, 1949, of larceny and was sentenced to eighteen months' imprisonment. The applicant came within section 22 (1) of the Criminal Justice Act, 1948, but the Chairman did not make an order relating to supervision after discharge under the subsection. The Chairman stated that his attention had been called to the provisions of the subsection, and added: " In your case, in the exercise of the Court's discretion, I do not propose to make an order ".

No counsel appeared.

THE LORD CHIEF JUSTICE: The Court adjourned this application at the last hearing, and we will deal with it now. The reason we adjourned it was that the justices at the West Kent Quarter Sessions passed a sentence of eighteen months upon the applicant which, in the circumstances, was quite a proper sentence. The applicant had stolen a bicycle belonging to his brother, his father having given him permission to use the bicycle for the purpose of looking for work. Then, having stolen the bicycle, he sold it to a Mr. Batchelor and afterwards attempted to obtain from his father a sum of £3 by falsely pretending that he required that sum in order to recover the bicycle which he had given as security to Mr. Batchelor for an advance of £2.

1949.
Nov. 7.

WILLIAM GEORGE KEELER.

Goddard, L.C.J., Hilbery, J., Birkett, J.

He is a man with a very poor record, and the sentence of eighteen months was certainly one which was well deserved, but in passing the sentence the learned Chairman said: "My attention has been drawn to a requirement of the Criminal Justice Act, 1948, which provides in such a case as yours that the Court shall make an order requiring you to notify your address to an appropriate society for dealing with the after-care of prisoners, unless, having regard to the circumstances, including the character of the offender, it otherwise determines. In your case, in the exercise of the Court's discretion, I do not propose to make such an order".

We could not understand why in this case the Court had refrained from making the order which the statute says shall be made. The requirement is that it shall be made unless there are certain reasons why it should not be made. We can see no reason in this case why it should not have been made, and the Court desires to say that where a Court of Quarter Sessions is refraining from making an order under section 22, it is desirable that the Court should state the reasons why it is refraining from making an order.

We desire to point out that the words of the statute are mandatory. The position is very much the same as in a case where justices are dealing with an offence under the Road Traffic Act in respect of which the statute provides that a disqualification for holding a driving licence shall be imposed. We have already in well-known authorities pointed out that if magistrates in such cases refrain from making an order for disqualification for special reasons, they must state what are their special reasons, so that this Court can have an opportunity of considering them on appeal.

Just the same principle applies under section 22. The words of the section are mandatory. The Court is to make an order; it is its duty to make an order unless it finds some special reasons for not doing so, and in such a case those special reasons ought to be given.

In this particular case we asked the learned Chairman to tell us what were the reasons and he gives as a reason for

1949.
Nov. 7.

WILLIAM GEORGE KEELER.

Goddard, L.C.J., Hilbery, J., Birkett, J.

coming to his conclusion one which ought not to have prevailed; it is that one of the justices " suggested to me that the machinery for tracing prisoners who failed to notify their changes of address imposed an embarrassing burden on the society concerned and might tend to undermine relations between the society and the prisoner ". That might have been a matter to be brought to the attention of Parliament when they were making this provision, but we cannot agree that that is a good reason for refraining from making an order which Parliament has said shall be made unless there are special circumstances, including the character of the prisoner, which would justify the justices in not making the order.

In this case we think an order ought to have been made, and an order must be made. In future, we hope that quarter sessions, when they are refraining from making an order under section 22 in a case in which the provisions of the section would otherwise apply, will state the reasons which move them not to make the order. The order in this case must be made.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BIRKETT.

BERNARD APICELLA.

1949.
Nov. 7.

Sentence—Corrective Training—Preventive Detention—Duty of Court before Passing Sentence—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1) (2).

The sentence of corrective training is designed to be in the nature of an extension of the principles underlying Borstal treatment.

Before passing a sentence either of corrective training or preventive detention, a Court has a duty beyond satisfying

1949.
Nov. 7.

BERNARD APICELLA.

Goddard, L.C.J., Hilbery, J., Birkett, J.

itself that the statutory conditions are fulfilled and that the Prison Commissioners have reported that the prisoner is physically and mentally fit and suitable for such a sentence. The Court must further weigh up all the facts and circumstances of the particular case and then decide whether such a sentence is appropriate.

Application for leave to appeal against conviction.

The applicant was convicted at Essex Quarter Sessions on September 1, 1949, of larceny and was sentenced to two years' corrective training.

The applicant was thirty years of age, and had been four times previously convicted. His last conviction was in 1941, when he received twelve months' imprisonment for receiving stolen property. This was his only previous conviction for dishonesty.

No counsel appeared.

BIRKETT, J.: This applicant was convicted at Essex Quarter Sessions on September 1, 1949, of stealing two horses at Ilford, the property of Helen Clark, and he was sentenced to two years' corrective training. He applies to this Court for leave to appeal against conviction only; he does not appeal against sentence.

[After stating that, in the opinion of the Court, there was no ground for interfering with the conviction, His Lordship continued:] The application for leave to appeal against conviction is, therefore, dismissed, and strictly, the case should end there because there is no appeal against sentence; but there is one word of some importance I am desired to say on this matter. The applicant is thirty years of age, and it is true that there are four previous convictions against him. With regard to the two previous convictions in 1939 and in 1941 which apparently were put to him in accordance with the statute, for the first of those offences he received three years' Borstal detention on a charge of unlawful wounding. Then in 1941 he received twelve months' imprisonment for receiving stolen property. But since 1941 there have been no criminal

1949.
Nov. 7.

BERNARD APICELLA.

Goddard, L.C.J., Hilbery, J., Birkett, J.

proceedings against him at all, and the offence in 1941 is the only previous conviction of dishonesty.

What it is desired I should say is this: the mere fact that the conditions of the statute dealing with corrective training are fulfilled is by no means a reason why a sentence of corrective training should be imposed. The sentence of corrective training under the Criminal Justice Act is designed, in our view, to be in the nature of an extension of the principles underlying Borstal treatment. Indeed, section 21 of the Act, after laying down the conditions with regard to age and previous conditions on which corrective training may be imposed, continues: "... if the Court is satisfied that it is expedient with a view to his reformation and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the Court may pass, in lieu of any other sentence, a sentence of corrective training ...".

This case was a case where a man had stolen two horses, and he was convicted upon that charge. He had had no conviction at all since 1941, a matter of eight years, and he had had only one conviction for dishonesty. The view the Court takes is that this was not a case in which it was proper for corrective training to be imposed. The facts of this case did not really come within the principles of such a sentence, and it is desired that it should be said that, before a sentence of corrective training is passed, it is not enough that the mere elements of the statute have been fulfilled and that the prisoner is eligible for corrective training, but the Court must consider all the facts of the case and the design of the statute before imposing the sentence.

In this case there is no appeal against sentence and therefore the Court can do nothing, and this sentence of two years' corrective training must stand. But it is important that the minds of those who are concerned with the administration of the Act should be drawn to this matter to see that, when

1949.
Nov. 7.

BERNARD APICELLA.

Goddard, L.C.J., Hilbery, J., Birkett, J.

corrective training is imposed, the facts of the case indicate that it is a case for corrective training.

Perhaps I ought to add this: this Court on another occasion, when dealing with the Criminal Justice Act, 1948, and the sentence of preventive detention, pointed out that, when the question of a sentence of preventive detention is being considered, it is not enough that the conditions of the statute have been fulfilled, and that the Prison Commissioners in their report have stated that the man is physically and mentally fit, if the Court thinks it right to impose a sentence of preventive detention. Similarly with regard to corrective training; the mere fact that all the conditions are fulfilled and that the Prison Commissioners report to the Court that there is no reason why a sentence of corrective training should not be imposed if the Court thinks fit, is of itself no reason why corrective training should be ordered. There is not a direction from the Prison Commissioners that corrective training should be given; there is merely a report to say "If the Court is so minded, the prisoner is physically and mentally fit and is suitable". In the last resort, both with regard to preventive detention and corrective training, it is the duty of the Court not merely to see that the statutory conditions are fulfilled, and that the Prison Commissioners find no reason why the sentence should not be imposed, but the Court itself must weigh up the facts and circumstances of the case and then decide the appropriate sentence.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE PRITCHARD

SAMUEL GREEN.

1949. *Dec. 5.*

Jury—Retirement—Communication to Judge—Communication and Answer to be Read out in Open Court.

It is essential that any communication by a jury after retirement to the presiding Judge and the answer thereto should be read out in open Court in the presence of the prisoner, so that both the prosecution and the defence may be aware of their contents.

Appeal against conviction.

The appellant was convicted at Bolton Quarter Sessions on October 4, 1949, of receiving stolen property and was sentenced by the Recorder to Borstal training. After the jury had retired to consider their verdict, they sent a communication to the Recorder, the precise contents of which the Recorder was subsequently unable to remember. The Recorder received it in his private room, and being of opinion that it related to a small matter with which he had already dealt in his summing-up, sent back the answer to the jury from his room, without coming back into Court.

H. Lever, for the appellant:

There was a departure from the recognised rules of procedure. The communication from the jury, and the answer thereto, should have been read out in open Court, in the presence of the prisoner.

He referred to WILLMONT (1914), 10 Cr. App. R. 173.

W. G. Morris, for the Crown.

It would certainly have been more proper for the jury's communication to have been dealt with by the Recorder in open Court. The Recorder evidently regarded the communication as referring to a small matter with which he had already

1949.
Dec. 5.

SAMUEL GREEN.

Goddard, L.C.J., Cassels, J. Pritchard, J

dealt in his summing-up. The evidence of the appellant's guilt was overwhelming and the Court is asked to consider whether, despite the irregularity, this is not a case where the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied.

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Recorder of Bolton of a serious case of receiving stolen property. The Court has read the evidence and, but for one fact which I will mention, we certainly see no reason for interfering with the verdict of the jury or the sentence.

It was a bad case. The charge was stealing 60,947 yards of cloth, of the value of over £7,000, and there can be no doubt on the evidence that the conviction was amply justified, but, unfortunately, the Recorder has made an error in this case. After the jury were enclosed, they sent a communication to the Recorder. The Recorder received that communication in his private room and from there he sent an answer to the jury and did not come into Court and say what the question was which the jury had put, or what was his answer. He has reported to this Court: " The note from the jury was returned to them. It contained a simple question (the exact terms I do not remember) with which I had dealt in my summing-up. I considered whether it was necessary to call them back into Court, but as the question was, as I have said, so simple and had been dealt with, I did not deem it necessary ".

This Court and the Divisional Court has said on more than one occasion that any communication between a jury and the presiding Judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the jury are asking, and what is the answer. Very likely, in this case, it was purely immaterial, and if the Recorder had been able to tell us what the question was, we might have been able to consider it, although nothing that I say now should be taken in any way to authorise a departure from the well recognised rule that these matters must be done openly in Court.

1949.
Dec. 5.

SAMUEL GREEN.

Goddard, L.C.J., Cassels, J., Pritchard, J.

There was a case not so very long ago in the Divisional Court, BODMIN JUSTICES, [1947] K. B. 321, in which, after magistrates had retired to consider a case, they sent for a witness and asked him a question in their room. It was a question, as they told us in the affidavit which they filed, which was really in the interests of the prisoner, but, as it was done in the absence of the prisoner, the Court felt that the only thing they could do in that case was to bring up the conviction on *certiorari* and quash it.

In this case the Court feels the same difficulty. The communication made to the Recorder was not read out in Court and the appellant, therefore, does not know what the communication was. In these circumstances, however unfortunate it may be that a man who was, to the satisfaction of the jury, shown to have been guilty of a most serious crime should escape punishment, the Court feels that there is no option but to quash the conviction.

Conviction quashed.

Solicitors: J. H. Milner & Son, agents for Leslie M. Lever & Co., Manchester, for the appellant; Patersons, Snow & Co., for Edgar Fielding, Bolton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE PRITCHARD.

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Bankruptcy Offence—Obtaining Credit by Fraud—"Credit"—Money Parted with by Prosecutor without Expectation of Return—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 156 (*a*).

The appellant had installed electric wiring in a cottage belonging to T. T. desired to obtain an engine to generate the electric current, and the appellant agreed to get one for her. Some days later the appellant again saw T. and told her that he had ordered the engine, but asked her to let him have a cheque for £125, which he said was the price of the engine, explaining that, as he was in a small way of business and unknown to the manufacturers, he desired to pay the price to the manufacturers in advance. T. gave him the cheque as requested, but the appellant used the money to pay his own debts, and T. never obtained the engine or received her money back. The appellant was convicted of obtaining credit by fraud, contrary to section 156 (*a*) of the Bankruptcy Act, 1914.

Held, that there had been no obtaining of credit from T. and that the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Hampshire Quarter Sessions on October 4, 1949, of obtaining credit by false pretences, after being adjudged bankrupt, contrary to section 156 (*a*) of the Bankruptcy Act, 1914; of obtaining a cheque by false pretences; and of obtaining credit by fraud, after being adjudged bankrupt, contrary to section 156 (*a*) of the Bankruptcy Act, 1914. He was sentenced by the Deputy-Chairman to six, twelve and six months' imprisonment (concurrent).

In the first two counts, the allegations were respectively that the appellant had obtained credit for £500 and a cheque for £500 from Sir Francis Tower by falsely pretending that, owing to bad weather, he [the appellant] had not been able to proceed with a contract to supply electrical

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

equipment to certain houses and that he was thereby in financial difficulties due to that cause only and that such difficulties were, therefore, temporary. The Crown proved that no written contract was ever produced to the Official Receiver in the appellant's bankruptcy. With regard to the third count, the allegation was that the appellant falsely represented that he intended to apply the proceeds of a cheque for £125 which was handed to him by Lady Tower to the purchase of an engine which she had ordered from him. The facts relating to this count were as follows. The appellant had installed electric wiring in a cottage belonging to Lady Tower. Lady Tower desired to obtain an engine to generate electric current for the cottage and asked the appellant to obtain one for her, which the appellant agreed to do. Some days later the appellant again saw Lady Tower and told her that he had ordered the engine and that, as he was in a very small way of business and was unknown to the manufacturers, he felt that he should pay for the engine in advance. He therefore requested Lady Tower to let him have a cheque for £125, the price of the engine, so that he could remit the money to the manufacturers. Lady Tower gave him the cheque as requested, but the appellant used the money to pay his own rent, and Lady Tower never obtained the engine or received her money back.

Norman Brodrick, for the appellant:

With regard to counts one and two, the evidence for the Crown supported the making of the false pretences as laid, but no direct attempt was made to prove their falsity, except as regards the appellant's statement that his financial difficulties were temporary, the falsity of which statement was demonstrated, in the submission of the Crown, by the fact that the subsequent bankruptcy proceedings showed the appellant to have been insolvent at the material date. It was submitted for the appellant that one of the most material issues was whether the representation as to the existence of a contract and as to the temporary nature of the appellant's financial difficulties

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

formed a single pretence or two separate pretences, and it was clearly open to the jury to find that the two representations formed a single pretence, in which event the appellant was entitled to be acquitted. The Deputy-Chairman in his summing-up invited the jury to assume that the appellant did have a contract and that, therefore, that part of the alleged pretence was true. It is submitted that the Deputy-Chairman misdirected the jury, and that it is quite possible that if the jury had been properly directed they would not have convicted on these counts. With regard to count three, there was no obtaining of credit by the appellant. The money obtained by him was paid over for a particular purpose and the agreement between the appellant and Lady Tower never envisaged that the appellant should be entitled to use the money for his own purposes or for any purpose other than the transmission of the money to the manufacturer on behalf of Lady Tower to pay for the engine said to have been ordered. Any use of the money by the appellant for his own purposes would be a breach of his agreement with Lady Tower.

Robert Hughes, for the Crown :

With regard to counts one and two the gravamen of the charge was that the appellant said that he was in temporary financial difficulties. The jury were entitled to come to the conclusion that it was that statement which induced Admiral Tower to part with his cheque and that that statement was false to the knowledge of the appellant, and the convictions on these counts were right. Further, the Crown had gone some way to negative the existence of the alleged contract, in that they had proved that no written contract was ever produced to the Official Receiver. With regard to count three, obtaining money by way of loan may amount to the obtaining of credit. As the appellant, when he asked Lady Tower for the cheque for £125, intended to regard the sum as a loan and to use the money for the payment of his own rent, the transaction amounted, in effect, to a concealed loan.

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

PRITCHARD, J.: The appellant was adjudicated bankrupt on July 6, 1948, and on October 4, 1949, he was prosecuted and convicted at the Hampshire Quarter Sessions on an indictment which contained three counts. In the first count he was charged under section 156 (*a*) of the Bankruptcy Act, 1914, and the particulars of offence alleged that in February, 1948, in incurring a debt to Sir Francis Tower, he obtained credit to the amount of £500 by false pretences. In the second count he was charged that on the same occasion he obtained a cheque for £500 from Sir Francis Tower by false pretences, contrary to section 32 of the Larceny Act, 1916. In the third count he was charged again under the Bankruptcy Act, 1914, s. 156 (*a*), the particulars of offence alleging that in December, 1947, in incurring a debt to Lady Tower, he obtained credit to the extent of £125 by making certain false representations which are set out in the indictment, and to which I will refer later. There was a fourth count in the indictment which was withdrawn from the jury by the learned Chairman, and with that the Court is not concerned.

The appellant appeals against the convictions on the first three counts. With regard to counts one and two, the Court has come to the conclusion that the appeal must succeed, and as the reason in each case is the same, those two counts can be dealt with conveniently together. The false pretence which was alleged, and upon which each of those two counts depends, was laid in the following terms: "by falsely pretending that owing to bad weather he, the said Herbert William Laker, had not been able to proceed with a contract to supply electrical equipment to certain houses and that he was thereby in financial difficulties due to that cause only and that such difficulties were, therefore, temporary"

At the trial, Mr. Brodrick, who appeared for the appellant then, and has appeared for him here, submitted that the whole of that false pretence depended upon the existence or non-existence of the contract which is referred to in the particulars. He submitted that there was no evidence that there was not such a contract and asked the learned Chairman on that ground

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

to withdraw the case from the jury. The learned Chairman refused to withdraw the case from the jury. He dealt with this matter in his summing-up in the following terms: "I think it would be right for you to assume in this case that he did have a contract or that he may have had a contract to supply certain equipment. But the law does not require every detail of a false statement to be proved; what the prosecution have to satisfy you about is whether the substance of the statement was false. Now it is entirely a matter for you to say what the substance of that statement was. You may think that the substance of it was that this man was in temporary financial difficulties owing to the fact that he was unable to claim the money on his contract until he had completed it, and that he had been held up by the weather".

In the opinion of this Court, that involved a misdirection, for this reason, that if the substance of the false pretence alleged was that the appellant was in temporary financial difficulties, then the false statement which was alleged to have been made by him was not a false statement as to an existing fact, but was quite clearly a false promise as to what he was holding out would happen in the future. That is made more clear by reference to the evidence, from which it appears that it was the basis of the transaction between the appellant and Tower that the money should be repaid within a period of four months. In the cases of those two counts, therefore, although it appears to this Court perfectly clear that there was abundant evidence that this appellant had defrauded Sir Francis Tower, we come to the conclusion that there was no evidence that he did so by a false representation as to an existing fact. Therefore, although the appellant might have been convicted of fraud on Sir Francis Tower in one or more other ways, the conviction recorded against him of having defrauded Sir Francis Tower by means of false pretences cannot stand, and the convictions on counts one and two must be quashed.

With regard to count three, two points arise. Section 156 (*a*) of the Bankruptcy Act, 1914, creates two offences, (1) the

1949.
Dec. 5.

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

obtaining of credit under false pretences, and (2) the obtaining of credit by other frauds. This count in the indictment does not make it clear which offence is alleged. The statement of offence is simply "bankruptcy offence under section 156 (*a*)" and, unlike count one, the particulars to count three do not use the words "falsely pretending", but allege merely that the appellant falsely represented that he intended to apply the proceeds of a cheque for £125 which was handed to him by Lady Tower for the purchase of an engine she had ordered from him. In these circumstances, the first point that arises on the third count is that it appears to be clearly demurrable, and on that ground is bad.

The other ground upon which the conviction on the third count cannot be sustained, is this: On the evidence it appears quite clear that the appellant did not obtain credit from Lady Tower. Her evidence was that she required an engine which she wanted to use in order to produce electricity and electric lighting in a cottage she owned, and she asked the appellant, who carried on some business as an electrician, about such an engine. He said that he could get one for her and he could install it for her, and he told her that the cost of it would be £125. She was then asked: "How long after was there some discussion about money?", and her answer was: "It would be about a week or ten days later that anything was said about money. (Q) Tell the Court and jury what he said? (A) He came to see me, and he told me he had ordered the engine, but he was not in a very big way of business so would I mind paying the cheque for the price of the engine before I got delivery". Then she said that she did that. Then she said that she never got the engine and she never had the money back, and it appeared from the evidence that what the appellant did with that money, and what he always intended to do with it, was to pay his own rent.

In those circumstances, the Court is of opinion that there was no obtaining of credit from Lady Tower. In this instance, as in the other two counts, it is abundantly clear that the appellant defrauded Lady Tower, but unfortunately he was

1949. *Dec. 5.*

HERBERT WILLIAM LAKER.

Goddard, L.C.J., Cassels, J., Pritchard, J.

charged with having defrauded her in a way which the evidence did not support. He did not obtain credit, and therefore his conviction under section 156 (*a*) of the Bankruptcy Act cannot be sustained and must be quashed.

The result is that owing to lamentably lax consideration of this indictment, the appellant, who quite clearly, as I have said, defrauded both Sir Francis Tower and his wife, escapes the consequences because the evidence did not support the charges which were made against him. In those circumstances, this appeal is allowed and the conviction quashed.

Conviction quashed.

PRACTICE NOTE.

1949. *Dec. 12.*

CRIMINAL JUSTICE ACT, 1948, SS. 21–23.

Statement by the Lord Chief Justice.

THE LORD CHIEF JUSTICE: I want to mention two matters of practice under the Criminal Justice Act, 1948, with regard to sections 21–23. I am told that certain chief officers of police have raised the question as to whether when they serve notice on the prisoner of previous convictions and invite him to say whether he admits them or not, it is necessary to administer a caution. In the opinion of the Court it is not necessary that any caution should be administered when they are serving the appropriate notices.

The other point is that I am told there has been an inquiry from quarter sessions, or a point has been raised at a certain borough quarter sessions, as to whether or not a police officer can give evidence of the contents of the notice that he serves on the prisoner without giving a notice to produce. I am surprised this question should have been raised because I thought it was a well-known rule with regard to the law of

1949.
Dec. 12.

evidence relating to documents that no notice to produce a notice ever need be given.

The classic case, of course, is a notice to quit where an action is brought to recover possession of land. No notice to produce the notice is ever necessary and if authority was wanted, it was so expressly ruled by this Court in the case of TURNER, 3 Cr. App. R. 103; [1910] 1 K. B. 346, in which Channell, J., pointed out that if you had to give notice to produce the notice you would have to give notice to produce the notice to produce and so *ad infinitum*.

If ever the question is raised again, Chairmen of quarter sessions can rest assured it is not necessary to give notice to produce the notice which has been served on the prisoner.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE CASSELS.

ROBERT ANTHONY PAYNE.

1949.
Dec. 12.

Sentence—Joint Indictment—One Prisoner Pleading Guilty and Others Not Guilty—Postponement till Conclusion of Trial—Prisoner to be Called as Witness—Different Practice Appropriate.

Where several prisoners are joined in an indictment and some plead Guilty and others Not Guilty, the proper course is to postpone sentence on any prisoner who has pleaded Guilty until those who have pleaded Not Guilty have been tried, so that the Court may be in possession of the facts relating to all who are convicted and may be able to assess properly their degrees of guilt.

The above rule will not apply where a prisoner who has pleaded Guilty is to be called as a witness. In such circumstances it is a proper practice that sentence should be passed forthwith, so that there should be no suspicion of the prisoner's evidence being coloured by the fact that he hopes to get a lighter sentence because of the evidence which he gives.

1949.
Dec. 12.

ROBERT ANTHONY PAYNE.

Goddard L.C.J., Hilbery, J., Cassels, J.

Appeal against sentence.

The appellant, who was jointly indicted at Essex Quarter Sessions on October 26, 1949, with two other prisoners, on a charge of housebreaking, pleaded Guilty and was sentenced forthwith by the Chairman to two years' imprisonment. The other two prisoners, who pleaded Not Guilty, were tried on the following day before a different Chairman, and were found Guilty. They were sentenced to fifteen and twelve months' imprisonment respectively. The appellant was the youngest of the three prisoners.

No counsel appeared.

THE LORD CHIEF JUSTICE: The appellant pleaded Guilty at Essex Quarter Sessions to a charge of housebreaking. There have been a number of these cases of housebreaking carried out during the morning while housewives are out doing their shopping. In this case a considerable amount of property was stolen.

The appellant was indicted with two other young men, but the appellant was the youngest of the three. He received a sentence of two years' imprisonment, and the single Judge before whom this matter came in Chambers gave leave to appeal, because the appellant was the youngest and got a sentence of two years' imprisonment, while the other two were sentenced to fifteen months' and twelve months' respectively.

That result came about, apparently, through the practice of the Essex Quarter Sessions, which this Court does not hesitate to say ought to be changed. The three men were indicted together, but because the appellant pleaded Guilty, and the other two pleaded Not Guilty, the appellant was dealt with at once in the first Court. There the learned Chairman, having heard a statement by counsel for the prosecution, passed sentence on the appellant and the other two men were put back and were tried in the second Court on the next day before another Chairman. Both were convicted, and then that Court, having heard all the facts, proceeded to pass sentence in one case of fifteen months' and in the other case of twelve

1949.
Dec. 12.

ROBERT ANTHONY PAYNE.

Goddard, L.C.J., Hilbery, J., Cassels, J.

months'. Therefore the position in this case is that the appellant who had pleaded Guilty and is in fact the youngest of the three got two years' imprisonment from one Court and the other two got lighter sentences from another Court.

The Clerk of the Peace for Essex has written to this Court and told us what the practice is at Essex Quarter Sessions. He says: "It is a custom at the sessions for this county for all pleas to be taken on the first day and for all pleas of Guilty to be dealt with. This procedure enables the work of the Courts to be arranged. If a prisoner is represented and the plea is ascertained beforehand and found to be a plea of Not Guilty, the case is put in a list on a day convenient to the Court. If a person is not represented, the taking of the plea on the first day has the advantage of enabling the Court to arrange its work and if the accused wishes to apply for a dock brief or for a defence certificate, there is an adequate number of counsel present from whom to choose. This is not so on any subsequent day".

It may be a very convenient course to sentence prisoners who plead Guilty on the first day, but that ought not to apply where several persons are indicted together and one pleads Guilty and the other or others Not Guilty. In such a case the proper course is to postpone sentence on the prisoner who has pleaded Guilty until the other or others have been tried and then to bring the prisoner who has pleaded Guilty up in the Court where the other or others have been tried and let all who have been convicted be dealt with together, because by that time the Court will be in possesion of the facts relating to all of them and will be able to assess properly the degree of guilt among them. The reason why the appellant received a heavier sentence than his other two co-prisoners is because he was tried in a different Court on a different day. It is a most inconvenient practice and it is a practice which is wrong and which ought to cease. Quarter sessions should be informed that where more than one prisoner is joined in an indictment and one pleads Guilty and the other or others plead Not Guilty, the sentencing of the first one should be postponed until the

1949.
Dec. 12.

ROBERT ANTHONY PAYNE.

Goddard, L.C.J., Hilbery, J., Cassels, J.

others have been tried and all whose guilt has been established should be sentenced together. I hope that quarter sessions will take notice of the opinion of this Court and discontinue a practice which can only lead to disproportionate sentences being passed and will naturally leave a sense of grievance in the minds of prisoners.

What I have said will not apply in the exceptional case where a prisoner who pleads Guilty is going to be called as a witness. In such circumstances, the general practice is that he should be sentenced there and then, so that there should be no suspicion of his evidence being coloured by the fact that he hopes to get a lighter sentence because of the evidence which he gives. If it is a case in which one prisoner is going to be called to give evidence against another, that may be a good reason for dealing with him separately. I do not throw doubt on that very proper practice; I am speaking only of cases in which those circumstances do not arise.

In this case the Court has taken this matter into consideration and reduces the sentence to one of fifteen months' imprisonment, to date from conviction.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, MR. JUSTICE LEWIS, MR. JUSTICE HILBERY AND MR. JUSTICE CASSELS.

FREDERICK JAMES HOPKINS-HUSSON.

1949. *Dec.* 16.

Verdict—Dissatisfaction Felt by Trial Judge—Certificate for Appeal—Evidence to Support Verdict—Conviction Affirmed.

Conviction affirmed, there being evidence to support the verdict and the verdict not being one which could be regarded as unreasonable, although the Judge who tried the case had felt dissatisfied with the verdict and granted a certificate for appeal.

Appeal against conviction and sentence (on certificate).

The appellant was convicted at Durham Assizes on November 4, 1949, of committing an act of gross indecency with a male person and was sentenced by Oliver, J., to twelve months' imprisonment.

The appellant was a medical man, and was charged with committing acts of gross indecency with seven different boys. In the case of one boy the Judge withdrew the count from the jury, and in the cases of five other boys the jury acquitted the appellant. The defence was that those boys, who attended the same school and had opportunity of collaboration, had deliberately banded together to make unfounded charges against the appellant, who was hitherto a man of perfectly good character. The one case in which the jury convicted related to a boy of thirteen, and was quite independent of the cases relating to the other boys. The material facts of that case are set out in the judgment. The Judge expressed surprise at the verdict, and gave the appellant a certificate for appeal.

H. B. H. Hylton-Foster, K.C. and *Geoffrey Veale* for the appellant:

The verdict in this case was unsatisfactory, and it is quite apparent that the Judge so regarded it. It would appear to

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

have been arrived at by the jury by way of compromise. The verdict was especially unreasonable in view of the undisputed evidence that, after the boy had made a complaint to his mother with regard to the appellant's conduct, the appellant was permitted by the boy's parents to continue to attend the house as a doctor. The summing-up was generally favourable to the appellant, and no complaint is made of it except on one point. The boy's evidence was uncorroborated, but the Judge did intimate to the jury that there was a possibility of their deriving corroboration from the appellant's demeanour in the witness-box. This, in the circumstances, amounted to a misdirection.

Norman Harper, for the Crown:

There was evidence to support the jury's verdict on the count on which they convicted, and the jury were carefully warned by the Judge with regard to the manner in which they should approach the boy's evidence. The case of this boy was quite distinct from the cases of the other boys, in which there may have been opportunity for collaboration. The fact that the Judge at the trial has expressed disagreement with the verdict has never been regarded as a ground for quashing a conviction, if there was evidence on which the jury were entitled to convict. Even if the Judge's observations with regard to the appellant's demeanour in the witness-box were not entirely satisfactory, the summing-up, regarded as a whole, gave a perfectly fair picture of the defendant's evidence and was distinctly favourable to the defence.

THE LORD CHIEF JUSTICE: The appellant in this case was convicted before Oliver, J., at the last assizes for the county of Durham of the offence of gross indecency with one boy, and he appeals by virtue of a certificate given by the learned Judge. He was charged in respect of gross indecency with seven boys. There were in the indictment alternative counts charging him in respect of each boy with indecent assault or gross indecency. The learned Judge did not leave the counts of indecent assault

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

to the jury; all he left were the counts relating to gross indecency. With regard to one boy, the learned Judge refused to leave the case to the jury on the ground that he thought the boy was an untruthful and unsatisfactory witness, as he was either before the magistrates or before the Assize Court, because his evidence was completely different in the two courts.

With regard to the other six cases, the jury found a verdict of Not Guilty in five of them, and in the case of one boy, a boy called Allan Simpson, they found the appellant Guilty. It is fair and right to say that the learned Judge said in terms that he was surprised at the verdict, and he himself would obviously have preferred a verdict of acquittal; but it is also right to say that from a very early period in the history of this Court it has been laid down, and has been laid down frequently since, that the fact that the trial Judge was dissatisfied with the verdict, although it is a matter to be taken into account in this Court, must not be taken as a ground by itself for quashing the conviction. If it were, it would mean that we should be substituting the opinion of the Judge for the opinion of the jury, and that is one of the things which this Court will never do.

In just the same way it has been held from an equally early period in the history of this Court that the fact that some members or all the members of the Court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the jury.

In this case the prisoner was a medical man practising at Stockton, and he came before the Assize Court charged with indecent behaviour with a considerable number of young boys. The defence (there was no question about it) throughout the case was that there was a conspiracy on the part of a lot of dirty-minded youths and small boys who, for some reason

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

or other, had banded together to make an unfounded charge against a medical man of hitherto irreproachable character, in itself a somewhat surprising thing.

The jury, having heard the whole of the evidence, refused to convict in five cases. In one case, a case which, moreover, the learned Judge himself in his summing-up, which was conspicuously favourable to the accused, described as the strongest case and a case which at least appeared to make sense, the jury found a verdict of Guilty.

There is no ground whatever for saying in this case that there was a compromise verdict. There is, on the other hand, an indication that the jury used conspicuous care before they came to their verdict in this case. They were warned repeatedly by the learned Judge—I am not now dealing with the question of misdirection which Mr. Hylton-Foster raised and with which I will deal later—of the danger of convicting in cases of this sort where there is no corroboration. They were repeatedly told by the learned Judge that there was no corroboration of the boys' stories in any of the cases.

In the five cases in which the jury acquitted, there was evidence, undoubtedly, that there were opportunities among the boys for collaboration, opportunities for inventing or, at any rate, exaggerating, and opportunities for discussion which might lead—I do not say did, but might lead—to those boys putting forward a false and groundless accusation. On the other hand, there was enough in those cases for a careful jury to say: "At any rate, we are not on those cases satisfied of the guilt of the accused and we shall therefore acquit". But because they do that in five cases, it does not mean that there is a compromise verdict or an improper verdict if, in another case which stands by itself, they take a contrary view; and in the case of the one boy Allan Simpson, in respect of whom they found a verdict of Guilty, there was no pretence, or only slight pretence, which one may disregard, at saying that he was any party to any conspiracy or agreement or collaboration leading to the making of the charge against the doctor.

The case so far as Allan Simpson was concerned was this:

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

The appellant was attending at the house of the boy's parents where one of the family was ill. The doctor prescribed a particular poultice which had to be fetched from the chemist, and this young boy of thirteen, as he was at the time, being fourteen when he gave evidence, was about to start off to visit the chemist when the doctor told him that he would give him a lift in his car. There is nothing sinister about that. In fact, the doctor was not going straight to the chemist but apparently was going, or at any rate, did go (I will not say by a round-about route) to visit another patient on his way. I can well understand the jury asking themselves: why did he then offer the boy a ride to the chemist? The boy was going off to a chemist. The doctor was going to a visit a patient. Why should he take the boy then? It was not as if he was going straight past the chemist's. That may be one element in the case, but I do not say it is a very important one.

The boy's evidence was that, as he was sitting beside the doctor in a small car, the doctor took the boy's hand and put it between his own legs so that the boy could feel his person, his hand resting on the outside of his trousers; and the boy described it. When they arrived at the other patient's house, the boy had been told to get out and look for the number, and undoubtedly he did go back into the car; but when the doctor went into the other patient's house, the boy did not wait, but went straight home. It is also to be observed that he did not even go to the chemist, but went straight home and complained to his mother. That, at any rate, showed complete consistency of conduct on the part of the boy.

The subsequent fact which so impressed the learned Judge even with regard to this case was that, in spite of the complaint to the mother, the parents allowed the doctor to continue to come to the house. He was at the house the very next day. Of course, it was a perfectly proper point to make in a case of this sort, that if the appellant had committed this act on this boy and had so disturbed the boy that he went home crying to his mother or in a nervous and agitated state, it was not likely that the appellant would put his head into

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

the lion's mouth by going back to the house the next day. Unfortunately, one knows in homosexual cases that what people addicted to these practices may do is quite unpredictable; but, at any rate, that was a matter for the jury. So also was the fact that the father and mother allowed the doctor to continue to visit the family, working class people, who would be well known to the jury—a jury drawn from their own neighbourhood, who would know exactly what, if any, significance was to be attached to that fact, or whether any significance was to be attached to it.

Those were all matters which were put before the jury, I have no doubt, with force by the learned counsel who appeared for the defence, and equally favourably to the prisoner by the learned Judge in his summing-up. Upon that, the jury, having heard the evidence of this boy which, as I have said, stood out in contradistinction in many respects from the evidence of the other boys because against him there could be no suggestion of collaboration, came to the conclusion that they believed him; and if they believed the boy, they were entitled to convict and they did convict. I can say no more about the verdict of the jury than this, that after an hour and a half of careful consideration, they indicated by their verdict that they had given the most careful consideration that any jury could give to a case; that in five cases in which it was at least open to them to convict but in which there were facts and circumstances which raised some doubt, they refused to convict. In the case which was admittedly the strongest and which had none of the features which might cause doubt in the other cases, they decided to convict. It is impossible for this Court to say, in the words of the statute, that the verdict to which they came was unreasonable or could not be supported having regard to the evidence. It clearly could be supported by the evidence. It is not possible for one moment to say, as in our opinion the learned Judge seemed to think, that it was unreasonable because they had acquitted in the other cases that they should convict in this case.

That leaves the only other point in the case submitted on

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

behalf of the appellant. It is said that in the course of the summing-up, which, as everyone agrees, was as favourable as can be well imagined to the appellant, the learned Judge misdirected them on the subject of corroboration. The passage which is complained of is this, and occurs almost before the conclusion: " When I said that there was no corroboration, I was saying that there was no corroboration on the prosecution's own evidence. You saw the accused, and it is entirely for you to make up your minds, not for me. If you think, having looked at him, and having listened to his evidence—any of which may have struck you particularly—that his demeanour and evidence was the demeanour and evidence of a guilty man, you will say so. If you found that in his evidence there was corroboration; if there comes from him, or, if in your opinion there came from him, anything which really supports and makes it likely that any or all of these charges are true, you may treat that as corroboration, because it comes from him and affects him; but beyond that, what a man can do in his defence in a matter of this sort, he appears to have done ". He then mentioned various matters in relation to the defence, pointing out to the jury that in his opinion the evidence of the defendant was only such evidence as one might expect him to give and that he could not have done more.

It is said that that amounts to a misdirection because he told the jury there was corroboration, or might be corroboration, in the defendant's own evidence. Undoubtedly a prisoner can, and not infrequently does, corroborate the evidence for the prosecution. In this case it is right to say that the evidence of the prisoner himself contained nothing which could amount to corroboration, and there remained the question of demeanour. Of course, the demeanour of a witness is always a most important matter in a case. That is why courts of appeal, either in civil or criminal matters, are very slow to differ from juries or to differ from a finding of fact because they have not the advantage which the Court below has of seeing the demeanour of the witnesses. A jury are entitled to take into account the demeanour of a prisoner in the box

1949.
Dec. 16.

FREDERICK JAMES HOPKINS-HUSSON.

Goddard, L.C.J., Humphreys, J., Lewis, J., Hilbery, J., Cassels, J.

because it may satisfy the jury that he is a guilty man. The borderline between a jury being satisfied by demeanour that the prisoner is guilty and finding corroboration in that demeanour is, at any rate, very fine. When one bears in mind that the learned Judge from the start up to the end of his summing-up told the jury there was no corroboration, we do not think that that particular sentence which the learned Judge used could have left the jury in any doubt as to what he meant, namely: "If you think from the way in which he gave his evidence, the way in which he answered the questions, and his demeanour in the witness-box, he has shown himself to be a guilty man, you are at liberty to act upon it". That is what we think the learned Judge meant in what he said. We think that no reasonable jury could have misunderstood the learned Judge's meaning in that respect.

For these reasons we find it impossible to interfere with the verdict, and the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LEWIS AND MR. JUSTICE CASSELS.

LEONARD ERNEST MATTHEWS.

1949. *Dec.* 16.

Summing-up—Receiving Stolen Property—Innocent Receipt—Subsequent Guilty Intent.

The appellant, who was charged with receiving stolen property, admitted that when he received the property he knew it to be stolen, but said that he had received it with the intention of handing it over to the police. He did communicate with the police by telephone, but at the appointment which he had made he did not hand the property over to the police, and it was not found till the next day and was then hidden behind the seat of the police car in which the appellant had travelled. The Chairman directed the jury: "You may think that when [the appellant] telephoned the police he may have been intending to hand over the stolen property. Assume that he did, if he changed that intention, then we are in this position: he received property which was stolen, which he knew to be stolen, and having no guilty intent originally, nevertheless he changed that intent and kept it, and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police". The jury convicted the appellant.

Held, that the above direction was a misdirection and that the conviction must be quashed. If at the time when property is received the receipt is innocent, the fact that the person who has taken the property subsequently changes his mind and misappropriates it does not render the taking either receiving stolen property or larceny. If the original taking is tortious, though not felonious (as in the case of a trespass), the fact that the person who has taken the property subsequently misappropriates it converts the tort into larceny.

RUSE *v.* READ, 33 Cr. App. R. 67; [1949] 1 K. B. 377, and RILEY (1853), Dears. C. C. 149, distinguished.

Appeal against conviction.

The appellant was convicted at Hampshire Quarter Sessions on October 6, 1949, of receiving stolen property. He pleaded Guilty to two charges of obtaining property by false pretences

1949.
Dec. 16.

LEONARD ERNEST MATTHEWS.

Goddard, L.C.J., Lewis, J., Cassels, J.

and asked for eight other offences to be taken into consideration. He was sentenced by the Chairman to seven years' preventive detention.

The appellant's defence to the charge of receiving stolen property was that he knew that the property was stolen at the time when he received it, but that he received it with the intention of handing it over to the police. He sent a telephone message to the police and made an appointment. When the police came to see him, he did not hand over the property, and it was found on the following day hidden behind the seat of a police car in which the appellant had travelled. The Chairman directed the jury: "You may think that when [the appellant] telephoned to the police he may have intended to hand over the stolen property. Assume that he did, if he changed that intention, then we are in this position: he received property which was stolen, which he knew to be stolen, and having no guilty intent originally, nevertheless he changed that intent and kept it, and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police".

H. Summerfield, for the appellant:

The summing-up of the Chairman amounted to a misdirection. The guilty intent must exist at the time of the receiving of the property. If the appellant received the property intending at that time to hand it over to the police, there was no guilty intent at the material time. [He was stopped.]

E. S. Fay, for the Crown:

The receipt of the property by the appellant cannot be regarded as entirely innocent, inasmuch as he knew quite well that he was handling stolen property. The Chairman was too favourable to the appellant in assuming that no guilty intent was present in his mind at the time when he received the property.

1949.
Dec. 16.

LEONARD ERNEST MATTHEWS.

Goddard, L.C.J., Lewis, J., Cassels, J.

THE LORD CHIEF JUSTICE: This appellant was convicted at Hampshire Quarter Sessions of receiving stolen property. He pleaded Guilty to two charges of false pretences, and asked for eight other offences to be taken into consideration. He has a remarkable record and was sentenced to seven years' preventive detention, and the Court, although it is going to quash the conviction on one count, sees no ground for interfering with the sentence. The sentence was entirely justified.

The only point in this case is whether the conviction on the count for receiving was right. If the appellant has been convicted on a wrong view of the law, he is entitled to have that conviction quashed even though it makes no difference to his sentence. The curious thing about this case is that we understood there was no appeal against sentence, though we are now asked to take that into consideration. The other possibly surprising thing is the argument which has been addressed to us by counsel for the prosecution who is seeking to uphold this conviction.

What happened was this: The appellant undoubtedly received some property which he knew to be stolen. His defence was: "I received that property from the thief. I knew he was a thief and I knew he had stolen the property, but my intention when I received it was to hand it over to the police". Whether he wanted to give away the man who had stolen the property or not, we need not inquire, but he said that he received the property with the innocent and praiseworthy intention of handing it over to the police. He undoubtedly did send a telephone message to the police, who were at that time anxious to see him with regard to some motor cars which had been obtained by false pretences. When the police saw the appellant pursuant to the appointment which he had made, he did not hand over the property to them. He was placed in a police car and taken off in custody to a police station, and somehow or other while he was in the police car he managed to get this stolen property out of his pocket and slip it down behind the seat of the car, and it was not found till the next day.

1949.
Dec. 16.

LEONARD ERNEST MATTHEWS.

Goddard, L.C.J., Lewis, J., Cassels, J.

The learned Chairman directed the jury in this way: "On those facts you have got to consider this. You may think that when he telephoned to the police he may have been intending to hand over the stolen property. Assume that he did, if he changed that intention, then we are in this position: he received property which was stolen, which he knew to be stolen, and having no guilty intent originally, nevertheless he changed that intent and kept it, and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police".

In the opinion of this Court, that is a misdirection. If the appellant received the property in the circumstances which he desired the jury to find, with intention of at once handing it over to the police, though the learned Chairman might well have asked the jury whether in all the circumstances the appellant could possibly have had that intention, then that would not be a felonious receipt.

The Court cannot possibly accept the argument which has been addressed to it on behalf of the prosecution that a person who has received stolen property intending at once to hand it over to the police or the true owner, is nevertheless guilty of the felony of receiving stolen property. That would mean that if somebody chased a thief and picked up stolen property, which had been dropped by the thief, he would be guilty of the offence of receiving stolen property. That is so startling that I am surprised the argument can be put; at any rate, it is not the law.

If at the time when the property is received the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony, and that has been the law of this country for very many years. If a person, having received property innocently, then changes his mind and misappropriates it, it has been more than once attempted to be said that that would amount to larceny; but a little time ago in the Divisional Court we considered the old case of RILEY (1853), Dears. C. C. 149, in RUSE *v.* READ, 33 Cr. App. R. 67; [1949] 1 K. B. 377. We there

pointed out that if the original taking is wrongful though not felonious, that is to say amounts to trespass, and if the taker subsequently appropriates the property, that does amount to felony. In RILEY (*supra*) a man drove his sheep into a field and the next day, after driving them out, found among his flock a sheep which did not belong to him and which he knew did not belong to him. Taking that sheep out of the field was technically a trespass to goods. At the time when the taker took it out, he was no doubt, innocent of felonious intent, but it was nevertheless a trespass. When, having wrongfully though not feloniously taken the sheep, he afterwards made up his mind to appropriate it, he became guilty of felony.

In RUSE *v.* READ (*supra*) the justices found that the defendant, when under the influence of liquor, borrowed or took a bicycle and proceeded to ride about on it. He then took it home and the justices found that he had no felonious intent at the time when he took it home. But the next day when he found that he had the bicycle, instead of returning it to the police or the true owner, he proceeded to pack it up and address it from the west country to himself at some station in the north. We held that that amounted to stealing. It was never said in RILEY (*supra*) or in RUSE *v.* READ (*supra*) that the defendant had become guilty of receiving. What was said was that he had become guilty of stealing.

In this case, if the jury had believed the appellant's evidence that he had innocently taken the property in the sense that he intended to return it to the true owner or the police, there would be no trespass, and therefore he could not be guilty of the offence of stealing. There was a complete misdirection by the learned Chairman on the law of receiving, and therefore the conviction on count two must be quashed; but, as I have already said, the Court does not see fit in this case to make any difference in the sentence.

Conviction on one count quashed.

Solicitors: Talbot & Davies, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE MORRIS.

ERNEST ALBERT REYNOLDS.

1950.
Jan. 23.

Evidence—Child—Capacity to be Sworn—Evidence of Child's Mentality Given in Absence of Jury—Conviction Quashed—Children and Young Persons Act, 1933 (23 *Geo.* 5, *c.* 12), *s.* 38 (1).

Apart from evidence on the question whether an alleged confession is admissible or not, the giving of evidence in a criminal trial in the absence of the jury should be regarded as most exceptional.

Where, therefore, on a charge of indecent assault on a girl aged eleven, a question arose whether the child was fit to be sworn, or was of sufficient intelligence to justify the reception of her evidence unsworn, and in the absence of the jury a school attendance officer gave evidence of the mental capacity of the child.

Held, that an irregularity had occurred which necessitated the quashing of the conviction.

DUNNE (1929), 21 Cr. App. R. 176, applied.

Appeal against conviction.

The appellant was convicted at Hertfordshire Quarter Sessions on November 23, 1949, of indecently assaulting a girl aged eleven, and was sentenced by the Chairman to twelve months' imprisonment.

At the trial the question arose whether the girl, who was being educated at a school for children of retarded development, was fit to be sworn or to give evidence unsworn. The Chairman asked the child a number of questions with a view to ascertaining whether she understood the nature of an oath. Counsel for the appellant then said that he had certain submissions to make, and it was agreed that the child should leave the Court. The Clerk of the Peace then asked whether counsel for the appellant desired that the jury should be present while he

1950.
Jan. 23.

ERNEST ALBERT REYNOLDS.

Goddard, L.C.J., Byrne, J., Morris, J.

made his submissions. The Chairman said that the question whether the child was capable of taking the oath was one entirely for him, but that he was willing to listen to any submissions by counsel. He thought, however, that the jury should not be present. The jury then retired. In their absence, a school attendance officer was called. She stated that she had considerable knowledge of the child and was familiar with the school which she attended, the class of home from which she came and her standard of education. She was then cross-examined by counsel for the appellant. The jury then returned, the child was sworn and gave evidence on oath and the trial proceeded.

W. R. Rees-Davies, for the appellant.
C. J. T. Pensotti, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted at Hertfordshire Quarter Sessions of indecent assault on a child, and appeals against conviction. His counsel indicated various points which he intended to take on the appellant's behalf. These have not been fully argued, as another point has occurred to the Court which is of the greatest importance. When the Chairman had asked the child a number of very proper questions, Mr. Rees-Davies, who was appearing for the prisoner said: "There is a great deal that I have to put on this matter. I do not know whether this is a suitable moment. May I mention these matters at this stage?" The Chairman said: "I am not sure that the child had better be here". Mr. Rees-Davies then said: "I think it would be better if she withdraws. There are matters of very great moment which I must put here". It was quite unobjectionable to say that the child should go out of Court. The transcript then reads: "Mr. Pensotti (counsel for the Crown): With respect, Sir Granville, this is entirely a matter for you. I understand my friend has got some submissions to make about swearing the child. The Clerk of the Peace: Do you wish the jury to be

1950.
Jan. 23.

ERNEST ALBERT REYNOLDS.

Goddard, L.C.J., Byrne, J., Morris, J.

here, Mr. Rees-Davies? Mr. Rees-Davies: There are matters which I think the jury will have to hear, whether the child is sworn or unsworn. Mr. Pensotti: If my friend is proposing to make submissions, I object, because in my submission it is entirely a matter for you, Sir. If you are satisfied that the child can be sworn, then the child can be sworn. The Chairman: The question of whether the child is capable of taking the oath or not is entirely a question for me. If counsel says he wishes to make submissions to me, I am pleased to hear what they are. What I shall do with them is another matter. The only question at the moment is whether these submissions should be made in the absence of the jury. I think perhaps that would be the better course. Members of the jury, I do not know what is coming; it may be that it is something you should not hear until after the case. Therefore I must ask you to retire". The jury then retired.

Evidently the Clerk of the Peace in putting the question "Do you wish the jury to be here?" was thinking of the practice which always obtains in the Courts where there is a discussion whether a confession is admissible or not. In such circumstances the jury are always told to retire, for the obvious reason that, in the course of evidence, to prove the circumstances in which the confession was obtained, it is almost impossible to prevent the terms of the confession from being disclosed, and the whole question at that stage is whether or not the confession can go before the jury. The jury is out of Court during the argument so that they cannot hear the terms of the confession which, it may be held afterwards, is inadmissible.

The state of affairs in this case is entirely different. After the jury had retired evidence was given by a school attendance officer, who had been associated with the child and knew the school to which she had been sent, a school not for mentally deficient children, but for mentally retarded children. The child evidently came from a somewhat squalid home and her degree of education was very slight and less than one would

1950.
Jan. 23.

ERNEST ALBERT REYNOLDS.

Goddard, L.C.J., Byrne, J., Morris, J.

suppose to be ordinary for a child of her age. The witness gave evidence in chief and was cross-examined in the absence of the jury. Afterwards the jury were brought back into Court and the child gave evidence on oath. The question is whether that was such an irregularity that this conviction cannot be allowed to stand. In the opinion of the Court, it was.

What had the Chairman to decide first of all? That is provided in section 38 (1) of the Children and Young Persons Act, 1933, which reads: " Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth ". The child's evidence in such a case has to be corroborated by other evidence on oath. When a child is put into the witness-box, the presiding Judge has to decide first whether the child, in his opinion, understands the nature of an oath. If the child does not possess sufficient intelligence to understand the nature of an oath, the Judge must further consider whether the child is possessed of sufficient intelligence to justify the reception of unsworn evidence on the ground that it understands the duty of speaking the truth. It is perfectly true in this case that, if the Chairman had found that the child did not understand the nature of an oath, there would have been an end of the case because there was no evidence against the prisoner other than the evidence of the child.

In DUNNE (1929), 21 Cr. App. R. 176, on a charge of incest, a child of seven was put in the box to be examined. The Judge had the child brought round to his room for the purpose of examining her and seeing whether she understood the nature of an oath. The child afterwards gave evidence. The Court, in quashing the conviction, said (at p. 178): " It goes without saying that what the Judge did in that matter was suggested purely by feelings of kindness and consideration for the

1950.
Jan. 23.

ERNEST ALBERT REYNOLDS.

Goddard, L.C.J., Byrne, J., Morris, J.

youthful witness. The question for this Court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel. Admittedly, nobody in this Court, either from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The Court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed ".

No member of this Court has ever known of a case in which a witness has been called to inform the Court whether a child was capable of giving evidence or not. I am not saying that there may not be cases—perhaps this was one—in which a Judge may want some assistance, especially if he has heard that the child is at a particular sort of school. It is not on that ground that the Court thinks there has been a fatal mistake here. The reason why the Court in DUNNE (*supra*) decided that the evidence of the child must be given in the presence of the jury was, obviously, that, although the duty of deciding whether the child may be sworn or not lies on the Judge and is not a matter for the jury, it is most important that the jury should hear the child's answers and see its demeanour when questioned, because those matters will enable the jury to come to a conclusion as to the weight they should attach to its evidence. *A fortiori*, the jury should be present when a witness is called to assist the Court by telling the Court what his or her experience of the child is, and what impression he or she has formed of the child's character. The jury will then have before them all the available information with regard to the child's reputation or character for truthfulness.

It should be regarded as most exceptional that any evidence should be given in a criminal trial in the absence of the jury. There is one well-known exception, which has been laid down in mercy and fairness to prisoners, that any evidence on the question whether a confession was properly obtained ought to be given in the absence of the jury. Evidence of the kind

given in the present case ought to be given in the presence of the jury and in open Court. For these reasons we have come to the conclusion that this conviction cannot stand and must be quashed.

1950. *Jan.* 23.

ERNEST ALBERT REYNOLDS.

Goddard, L.C.J., Byrne, J., Morris, J.

Conviction quashed.

Solicitors: Cartwright, Cunningham & Co., for the appellant; Hartley & Hine, Hitchin, for the Crown.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE HILBERY AND MR. JUSTICE SELLERS.

DOUGLAS CLARKE.

1950. *Feb.* 6, 13.

Suspected Person—Previous Convictions—Knowledge on part of Arresting Officer Unnecessary—Vagrancy Act, 1824 (4 *Geo.* 4, *c.* 83), *s.* 4—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 15.

A person who loiters in a place referred to in section 4 of the Vagrancy Act, 1824, with intent to commit a felony can become a "suspected person" within the meaning of that section if he has been previously convicted of theft or dishonesty, although the fact of such conviction is unknown to the police officer who arrests him.

LEDWITH *v.* ROBERTS, [1937] 1 K. B. 232, and FAIRBAIRN, 33 Cr. App. R. 179; [1949] 2 K. B. 690, considered.

Appeal against conviction (on certificate).

The appellant was convicted at Middlesex Sessions on December 5, 1949, of an offence under section 23 (2) of the Firearms Act, 1937, namely, having in his possession an imitation firearm at the time of committing an offence referred to in the Third Schedule of the Act, namely that of being a suspected person loitering with intent to commit a felony, contrary to section 4 of the Vagrancy Act, 1824. He was sentenced by the Deputy-Chairman to three years' corrective training.

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys J., Hilbery, J., Sellers, J.

The appellant was kept under observation by two police officers at about 2 a.m. on November 6, 1949, for about twenty minutes in different parts of the Great West Road and was seen to loiter about various streets in suspicious circumstances. When he was arrested, he was found to have in his possession an imitation firearm. He had previously been twice convicted, once of larceny, and once of shopbreaking and larceny, but the fact that he had been so convicted was unknown to the officers who arrested him. Evidence of the convictions was objected to at the trial, but was admitted by the Deputy-Chairman.

Cecil Havers, K.C. and *Michael Havers*, for the appellant:

It was established in LEDWITH *v.* ROBERTS, [1937] 1 K. B. 282, that there must be something antecedent to the events immediately prior to the arrest to bring the person arrested within the category of a "suspected person". The requisite antecedent circumstances may, it is submitted, fall under one of two heads—the person's previous conduct, as observed by the police officers arresting on some earlier occasion, or his previous character, as known to the police who arrest. If the previous convictions of the arrested person were unknown to the police who arrested him, there would be nothing to cause them to suspect him. FAIRBAIRN, 33 Cr. App. R. 179; [1949] 2 K. B. 690, did not alter the law as to the requisite antecedent circumstances giving rise to the suspicion laid down in LEDWITH *v.* ROBERTS (*supra*). That case merely established that the previous convictions can be relied on to prove that the arrested person comes within the category of a suspected person as well as to prove the intent to commit felony specifically referred to in section 15 of the Prevention of Crimes Act, 1871.

J. M. Griffith-Jones, for the Crown:

No support for the proposition that the previous convictions must be known to the arresting officer can be derived either from LEDWITH *v.* ROBERTS (*supra*) and FAIRBAIRN (*supra*), and any inference that is to be drawn from those cases points the

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys, J., Hilbery, J., Sellers, J.

other way. It is true that in the latter case the previous convictions were known to the arresting officers; but there are certainly passages in the judgment which are quite inconsistent with the view that such knowledge is essential.

Cur. adv. vult.

February 13.—The judgment of the Court was read by HUMPHREYS, J.: The appellant was convicted at the Middlesex Quarter Sessions and appeals from that conviction by virtue of a certificate granted by the Deputy-Chairman who presided at his trial.

The indictment contained one count which charged the appellant under section 23 (2) of the Firearms Act, 1937, with the composite offence created by that section which provides, *inter alia*, that a person who has in his possession any imitation firearm at the time of his committing an offence referred to in the Third Schedule of the Act shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence and liable to penal servitude for a term not exceeding seven years in addition to any penalty to which he may be sentenced for the first-mentioned offence. One of the offences in the Third Schedule is an offence under the provisions of section 4 of the Vagrancy Act, 1824, as amended by section 15 of the Prevention of Crimes Act, 1871, and section 7 of the Penal Servitude Act, 1891. Section 4 provides for a number of offences, one of which is thus stated: "Every suspected person or reputed thief frequenting or loitering about in any street, highway or any place of public resort, etc., with intent to commit a felony shall be deemed a rogue and vagabond", and by section 6 may be arrested without warrant.

The sole point raised by this case is the question whether a person who loiters in such a place with intent to commit a felony can be properly described as a "suspected person" because he has been previously convicted of theft or dishonesty, although the police officers who give evidence of his loitering with that intent are unaware of those previous convictions.

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys. J., Hilbery, J., Sellers, J.

The appellant was seen by two police officers about 2 a.m. on November 6, 1949, and kept under observation for about twenty minutes in different parts of the Great West Road. He was there seen to be loitering in and about various streets in circumstances which, as the jury found, satisfied them that he was loitering with intent to commit a felony. He was then arrested, and an imitation firearm was found upon him. In order to establish that he was a suspected person, it was proposed to prove that on August 17, 1942, the appellant had been convicted of larceny at Leicester City Quarter Sessions, that he then admitted to twelve other cases of larceny which he asked to be taken into consideration, and was sentenced to three years' Borstal detention; and further, that on July 22, 1948, at the same Court, he was convicted of shopbreaking and stealing and was sentenced to eighteen months' imprisonment. Those convictions were in fact unknown to the police officers who watched him on November 6, 1949. This evidence was objected to and, before any evidence was called, the question of the admissibility of that evidence from Leicester was discussed in the absence of the jury, counsel for the accused contending that such evidence was inadmissible.

Now, the evidence objected to was plainly admisible upon this charge as evidence of intent to commit a felony, since by section 15 of the Prevention of Crimes Act, 1871, it is provided that "in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved it appears that his intent was to commit a felony". It was argued for the accused on his trial, and the argument was repeated before us, that such evidence could not show that the accused was a suspected person within the meaning of the Vagrancy Act unless the previous convictions were known to the police officers who arrested him. It was apparently admitted by counsel for the prosecution that he could not rely upon the evidence of the police as proving antecedent acts of the accused

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys, J., Hilbery, J., Sellers, J.

before the time when they, being satisfied that he was loitering with intent, arrested him. It would in fact have been better if that admission had not been made before the evidence had been called, because in truth when the evidence came to be called, as it was upon the Deputy-Chairman's ruling that the evidence objected to was admissible, the police officers were able to give in evidence certain facts which might well have been found by the jury to be proof of antecedent acts of the nature referred to. Nor was it necessary that the argument should proceed in the absence of the jury, since the real objection was that the evidence, when given, did not create a *prima facie* case upon which the jury could find that the accused was a suspected person. However, as the case went to the jury upon the basis that the sole ground for alleging the then accused to be a suspected person depended upon his previous convictions, the appeal was argued upon that footing.

The words " suspected person " in section 4 of the 1824 Act and their meaning have been discussed in many cases, to most of which we think it unnecessary to refer. No case has apparently been reported raising this particular point, but in our opinion there is nothing in the Act or in any of the authorities to which we were referred to suggest that the previous convictions must be known to the arresting officers in order to prove that as the result of those convictions the person convicted became a suspected person. Any such decision would, in our view, tend to make the provisions of section 4 useless, since a thief might change his venue and the places where he chose to loiter with sufficient frequency to make it unlikely that the local police officers would recognise him or know anything about him.

However that may be, Mr. Havers relied upon the case of LEDWITH *v.* ROBERTS, [1937] 1 K. B. 232. The facts of that case were very different from those in the present case. That was an appeal from a decision of the presiding Judge of the Liverpool Court of Passage, who had held that in his opinion the facts alleged in the defence to an action for wrongful imprisonment, even if proved, would afford no defence in law

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys, J., Hilbery, J., Sellers, J.

to the action. No evidence was called at that time and the case was decided upon the basis that the allegations in the defence were assumed to be true, and upon that assumption the learned Judge decided that they disclosed no defence in law. The case, however, is in our opinion the leading decision upon the question of the meaning and effect of the words "suspected person" in section 4. Greer, L.J., in the course of his judgment observed as follows (at p. 245): "In my judgment . . . the special powers given to constables are confined to a class of persons described as 'suspected persons' or 'reputed thieves'. They can only be apprehended without warrant if they already are at the time of their arrest and imprisonment suspected persons or reputed thieves. I do not think that this means that if the constable suspects the person whom he apprehends he is entitled to arrest and imprison him without warrant. . . . I think 'suspected person' means a person who has acquired the character of a suspect"; and he adds a little later: "In my judgment, the powers of a constable to arrest without warrant are confined to cases in which he finds frequenting or loitering, etc., a person who has, by his previous conduct, become a suspected person".

That case was followed in 1949 by a case which came before this Court, FAIRBAIRN, 33 Cr. App. R. 179; [1949] 2 K. B. 690. The headnote of the report in the *Law Reports* is as follows: "Evidence of a previous conviction is admissible to establish that a person who is arrested under section 4 of the Vagrancy Act, 1824, on a charge of loitering with intent to commit a felony, is a 'suspected person' within the meaning of the section at the time of his arrest". The Lord Chief Justice, Lord Goddard, in delivering the judgment of the Court discussed many of the cases, including LEDWITH *v.* ROBERTS (*supra*). It is true that in that particular case the evidence of the police officers was that they knew the two persons who were arrested as convicted persons, but the judgment of the Court, in our opinion, clearly did not proceed upon the ground of their knowledge, and there are many passages in the judgment of the Lord Chief Justice which are quite inconsistent with any

1950.
Feb. 6, 13.

DOUGLAS CLARKE.

Humphreys, J., Hilbery, J., Sellers, J.

such view. Dealing with LEDWITH *v.* ROBERTS (*supra*), the Lord Chief Justice observed that that case laid down that the conduct or character of the people concerned must be such that they come fairly within the category of being suspected persons, and added (33 Cr. App. R. at p. 182; [1949] 2 K. B. at p. 694): "If people who have been previously convicted of theft are found loitering in the streets and their conduct is such as to give rise to a proper and reasonable suspicion that they are there with the intention of committing a felony, they are guilty of an offence under the Vagrancy Act, 1824, and can be dealt with as suspected persons loitering with intent to commit a felony". After observing that Scott, L.J., in LEDWITH *v.* ROBERTS (*supra*) obviously had in mind the fact that it would be possible to prove that a person was a suspected person by proving his previous record and character, the Lord Chief Justice added "and as a matter of common sense that must be so. If a man is found loitering in the street and acting in a suspicious manner and it is also found that he has had half a dozen previous convictions, obviously he can rightly be regarded as a suspected person by reason of his previous convictions". Later in his judgment there is again the following expression of opinion (33 Cr. App. R. at p. 184; [1949] 2 K. B. at p. 695): "It must, we think, be obvious that the prosecution must be allowed to prove a man's previous convictions to show that he was a suspected person. It is those previous convictions that make him a suspected person and previous convictions can always be proved if they are relevant to the charge before the Court". No case was brought to our attention in which any Judge has expressed any view as to knowledge on the part of the police officers of the past character of the accused person being required.

In our opinion those two cases show that such knowledge on the part of the police is irrelevant and certainly not essential. For those reasons this appeal is dismissed.

Appeal dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SELLERS.

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Evidence—Confession—Murder—Indictments for Murder of Wife and Child—Dead Bodies of Both Found Together in House where Prisoner Living—Statements to Police—Earlier Statements Accusing Other Persons—Final Statement Confessing Both Murders—Trial for Murder of Child—Admissibility of Confession of Murder of Wife.

Following the apparent disappearance of the appellant's wife and child from a house in which they had all been living, the dead bodies of the wife and child were found together in that house. After arrest, the appellant made several statements to the police. In the first two he accused other persons of being responsible for the death of the wife, but in the later statements he confessed that he himself had murdered both his wife and child. Separate indictments in respect of the two murders were preferred against the appellant, and the prosecution elected to proceed first on the indictment relating to the murder of the child. After an objection by the defence had been overruled, the appellant's confessions relating to the two murders were admitted in evidence in their entirety.

Held, that the confessions were rightly admitted, as the statements which the appellant had made with regard to the death of his wife were clearly relevant to the issue whether he had murdered his child.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on January 13, 1950, of the murder of his infant child, and was sentenced by Lewis, J., to death.

The appellant's wife and child had apparently disappeared from a house in which they had been living with the appellant. The dead bodies of both the wife and child were found in the boiler-room of the house. After arrest, the appellant made several statements to the police. In the first he said that a

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Goddard, L.C.J., Humphreys, J., Sellers, J.

stranger had been responsible for the death of his wife, and in the second he accused another occupant of the house, but in the later statements he confessed that he had murdered his wife on November 8 and hidden the body in the place where it was found and that he had murdered the child two days later and hidden her body also in the same place. Separate indictments were preferred against the appellant for the murder of his wife and child, and the prosecution elected to proceed first on the indictment relating to the child. The prosecution adduced in evidence the whole of the appellant's confessions relating to the murder of both his wife and child, and after overruling an objection by the defence, Lewis, J., held that it was admissible.

Malcolm Morris, for the appellant:

The portions of the appellant's statements which amounted to a confession of the murder of his wife should not have been admitted. Such evidence could have been admissible only if the prosecution were seeking to establish evidence of system, following the line of such authorities as MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57; BOND, [1906] 2 K. B. 389; or if the offences could be considered as part of one scheme or transaction, as in BIRDSEYE (1830), 4 C. & P. 386. But in the present case there was no attempt on the part of the prosecution to prove system, nor was there any evidence that the two murders were committed at the same time. The only evidence on this point was the appellant's own statement, in which he said that he killed the child two days after he killed his wife.

Christmas Humphreys and *Henry Elam*, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court before Lewis, J., of the murder of his infant daughter. A variety of grounds of appeal have been urged on his behalf, but there is only one point with which it is necessary to deal at any length, and that is whether

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Goddard, L.C.J., Humphreys, J., Sellers, J.

or not evidence with regard to statements which he made with regard to the death of his wife and his admission that he had caused her death was admissible in the case.

One cannot deal with this sort of question in an academic manner because it depends entirely on the nature of the case. The appellant and his wife and child were living in a house in which there were also living a Mr. and Mrs. Christie. At some time on the material date in November, 1949, the wife and child apparently disappeared from the house. I say "apparently" because their bodies were afterwards found there. They disappeared after Christie had heard during the night, in the flat where the appellant lived, noises of a description which caused him to get up and look out of the window to see if he could see what was happening. The explanation of the noises became only too apparent later. Next day, or the day after, Christie saw the appellant and was told by him that Mrs. Evans had gone to Bristol with the child. On Christie's expressing some surprise that she had not even said "goodbye"—because, apparently, they were living on terms of friendship—the appellant explained that she had to go off in a hurry and that she would write. The appellant himself went away, but some days afterwards came back and said that his wife was still down at Bristol or South Wales, it matters not where. Mrs. Evans and the child were never seen alive again. The metropolitan police, who had been informed, communicated with the police in South Wales where the appellant had gone, and he was subsequently arrested at Merthyr Tydfil. From that time on he proceeded to make various statements to account for the disappearance of his wife. It now appears that while he was at Bristol his mother had written a letter, which was read out to him by the aunt who received it, saying she did not know what lies Tim—that is the appellant—had been telling, but, at any rate, his wife and child had never been there.

When the appellant was arrested, he proceeded to make a variety of statements, the first of which was this. Owing to his wife being pregnant, he said, he had discussed the matter

with a stranger who had given him a bottle of pills for his wife to take, that she took the pills, and that the next day he found her lying dead on her bed: he first took her body to the flat below, which was at that time vacant, the owner being away ill; and later that night after Mr. and Mrs. Christie had gone to bed, he took the body downstairs and put it head first down the drain in the front of the house. Later that day he told the police that that story was untrue and he wanted to make another statement. On November 30, which was the day on which he made the first statement, he said that Christie, who lived with his wife on the ground floor, offered to perform an operation for abortion on his wife, but he refused to have anything to do with the suggestion. However, his wife told him that she had arranged with Christie to perform this operation, and that it was to be done on the morning of November 8. On the appellant's return from work that day Christie met him at the door, took him upstairs, and showed him his wife lying dead on her bed. Then Christie took the body down to the flat below and left it there, and told the appellant he would put the body down one of the drains to avoid trouble. The appellant stayed upstairs and fed and looked after the baby, and then went to bed himself. The next morning he went to work, and during his absence Christie arranged for a young couple in East Acton to take charge of the child. Christie said this couple would come for the baby the next morning, which they did. That would show that this baby was alive for a whole day after the mother was dead. As I have already said, so far as the evidence goes, no one saw the child alive. On his return from work, Christie told him that the baby had been taken away, and that he had put Mrs. Evans' body down the drain. Christie then advised him to sell his furniture and leave the district. The appellant followed this advice and went and stayed with his aunt in Wales where he remained. It is material now to say that the bodies of the wife and child were found together concealed in the boiler-room of the house where the appellant lived.

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Goddard, L.C.J., Humphreys, J., Sellers, J.

When the appellant was taken into custody by the metropolitan police after his arrest in Wales, he made a further statement. This time he said that he had strangled his wife with a piece of rope and had taken the body down to the flat below, and that after the Christies had gone to bed he took the body down into the yard and hid it in the wash-house, where it was found on November 8. The statement describes how, on November 10, he came home and strangled the baby and hid her in the wash-house. Whether he strangled her on November 8 or November 10 is not, in the opinion of the Court, in the least material. He said he strangled her on November 10. I have already pointed out that the wife disappeared and the child disappeared, as far as any evidence goes, at the same time, but it does not matter which story is true on that particular issue. The appellant, who had previously said that his wife's body had been put into a drain (by which I suppose he meant a sewer outside), and that Christie had taken the body and put it into the drain because he had himself performed an operation for abortion, now admitted that he had strangled his wife—and her death was due to strangulation and not an operation for abortion—and that he put her body in the very place where it was found, and alongside her body was found the body of the child which also, he said, he had strangled. Finally, he made a statement in which he described how he killed the wife and what he did with her body, and how he later murdered the child in his own room, and so on.

He was charged with the murder both of his wife and child and brought before an examining magistrate. The depositions were taken with regard to both charges, and the magistrates committed him for trial on both charges. Although two charges of murder can be included in one indictment, this Court has strongly expressed the view that not more than one murder should be included in one indictment. Accordingly, two indictments were preferred against the appellant, one for the murder of the wife and the other for murder of the child. The prosecution, electing, as they had the right to elect, decided that they would proceed with the indictment charging

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Goddard, L.C.J., Humphreys, J., Sellers, J.

the murder of the child. Before the case was opened to the jury, a submission was made to Lewis, J., that no evidence with regard to the murder of the wife could be given before the jury on the charge relating to the murder of the child. Lewis, J., over-ruled that submission, and allowed the statements which the appellant had made relating to the murder of his wife to be given in evidence. It is argued by counsel for the appellant that that was wrong, that the prosecution had no right to lead that evidence, and, that Lewis, J., should not have admitted it. He submitted that it would only have been admissible to show system, following the principle of some well-known murder cases, but no system was alleged here, nor, it was argued, was there any evidence that the two murders were committed at one and the same time, but, so far as there was any evidence, there was the statement of the appellant that he killed the child two days afterwards.

In the opinion of the Court, the real test we have to apply is: Was the evidence relevant, that is to say, did the statements which the appellants made with regard to the death of his wife bear on the question whether he was guilty or not guilty of the death of the child? In our opinion, it is impossible to say that the evidence was not relevant. Indeed, it was highly relevant in a case where, as here, two bodies, the body of the mother and the child, were found together in a house in which the appellant had been living. To account for the bodies of his wife and child being found there, both strangled, the appellant gave three explanations to the police, in two of which he accused first a stranger and then Christie of being responsible for the killing of the mother. Then came the third story in which he confessed both to the murder of the wife and to that of the child. In those circumstances it was most material that evidence should be given of what the appellant had said to account for the bodies being found. If the bodies of a mother and an infant child are found lying together, murdered, in a place, surely the evidence with regard to the death of the mother must be relevant to the question how the death of the child occurred and by whom the deaths were

1950.
Feb. 20.

TIMOTHY JOHN EVANS.

Goddard, L.C.J., Humphreys, J., Sellers, J.

caused. It is not a question of system. It is a question of relevance, and this evidence was relevant to show that the third statement which the appellant made was a true confession, because (as, perhaps, it is hardly necessary to say) in the witness-box he went back on it and said the confession was not true. It is material for that purpose to see what he said with regard to the whole matter for which he had to account. It was no good in a case of this sort accounting for the body of the child and not that of the mother. The appellant himself said: "I murdered the mother, my wife, by strangling, and thereafter I murdered my daughter by strangling her".

In our opinion, Lewis, J., was right in admitting the evidence, because it was relevant and not on any such ground as that it would be very inconvenient to try to disentangle the sentences which dealt with the daughter and not the mother. It was one and the same story and, in our opinion, that evidence was clearly relevant. In our opinion the appellant was properly convicted, there is no ground for interfering with the conviction, and the appeal is dismissed.

Appeal dismissed.

Solicitors: Freeborough & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SELLERS AND MR. JUSTICE DEVLIN.

VINCENT HOWARD FURLONG.
DENNIS GARTON FRENCH.
FREDERICK JAMES PICKARD.

1950.
Feb. 20, 24.

Jury—Retirement—Communication to Judge—Delivery of Verdict —Question and Answer Subsequently Read Out by Judge in Open Court—Prisoners not yet Sentenced—Irregularity Not Going to Root of Conviction.

The proper practice is that any communication from a jury after they have retired to consider their verdict, and the Judge's answer thereto, should be read out in open court before the jury have returned their verdict. The Judge has a discretion whether he will allow counsel, or the prisoner, if undefended, to address him on the jury's communication.

A jury, after retirement, sent a communication to the Judge asking for further assistance. At the Judge's suggestion the question, which was whether they could convict one of the prisoners of stealing some, but not all, of the property named in one of the counts of the indictment, was put into writing and the Judge wrote his answer thereto, which was "Yes, certainly, if that was what you found" After the jury had delivered their verdict, but before the prisoners were sentenced, the Judge read out the question and answer in open court.

Held, that though it would have been better if the Judge had read out the question and answer before the jury returned their verdict, yet, as that had been done before the conclusion of the trial, and as the question was one on which no argument would have been possible, there had been no irregularity which necessitated the quashing of the conviction.

GREEN, *ante*, p. 33; [1949] W. N. 488 distinguished.

Appeals against conviction and, in the case of the appellant Furlong, application for leave to appeal against sentence.

The appellants were convicted at Essex Assizes on December 1, 1949, of conspiracy to steal and larceny and were sentenced by Humphreys, J., Furlong to twelve months' and

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG.
DENNIS GARTON FRENCH.
FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

six months' imprisonment (concurrent), French to nine months' imprisonment and Pickard to eight months' imprisonment.

After the jury had retired to consider their verdict, they desired to ask a question of the Judge. The Judge, who had gone from the Court to his lodgings, directed his clerk to go over to the Court and ask the jury to put their question into writing. The jury did so, and the paper was handed to the bailiff. The Judge returned to Court immediately after his answer had been put into writing and handed back to the jury. Very soon afterwards the jury came back into Court and returned their verdict. After the jury had been discharged, the Judge read out in open Court the jury's question, which was whether they could convict one of the prisoners of stealing some, but not all, of the property named in one of the counts of the indictment, and his own answer, which was " Yes, certainly, if that was what you found ". The Judge postponed sentence on the prisoners till the following day.

J. D. Casswell, K.C., Bernard Gillis and *D. P. Sells*, for the appellants:

Any assistance required by the jury after their retirement must be given to them in open court in the presence of the prisoner. This rule of law is an application of the accepted principle that justice must not only be done, but must be seen to be done. Accordingly, the nature of the assistance required by and given to the jury, provided it arises from their consideration of their verdict, is not a material matter. While in some cases it may be convenient or advisable for the jury to reduce their question to writing, either in open court or in the jury room, the question asked and the assistance given to them by the presiding Judge must be given in open court, so that accused persons and their counsel may know the nature thereof at the time when such assistance is given to the jury. [He referred to *Archbold's Criminal Pleading, etc.*, 33rd ed., p. 204; *Bacon's Abridgment*, 7th ed., Vol. 4, p. 576; *Chitty's Criminal Law*, 2nd ed., Vol. 1, p. 633; *Hale's Pleas of the Crown*, Vol. II, pp. 296, 307; *The Compleat Juryman* (1752),

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG.
DENNIS GARTON FRENCH.
FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

pp. 168, 176; GREEN, 34 Cr. App. R. 33; [1949] W. N. 488; WILLMONT (1914), 10 Cr. App. R. 173; and BODMIN JUSTICES, [1947] K. B. 321.] Such an irregularity goes to the root of the conviction: NEAL, 33 Cr. App. R. 189; [1949] 2 K. B. 590; BODMIN JUSTICES (*supra*). It cannot be corrected by the Judge making known the nature of the assistance to the jury after the jury have returned their verdict. In any event, such an irregularity should not be capable of correction, if at all, after the discharge of the jury.

J. S. Bass, for the Crown:

Assuming that there was an irregularity in the Judge not making known the jury's question and his answer to it before the jury returned their verdict, the irregularity was not one which went to the root of the conviction, as was the case in NEAL (*supra*) and BODMIN JUSTICES (*supra*). The present case is distinguishable from GREEN (*supra*), in that in that case the defence never were told what the question and answer were. The communication of the question and answer to defending counsel before the verdict in the present case could not have had any effect on the course of the trial in view of the elementary nature of the question.

THE LORD CHIEF JUSTICE: The appellants were convicted before Humphreys, J., at the last autumn assizes for Essex on certain counts in an indictment which charged them with conspiracy to steal and with stealing. It was a case of a very serious character, involving thefts of Government property of considerable value from a Royal Air Force Station, and the evidence showed that there had been a very considerable and nefarious conspiracy to steal. The trial took a considerable time, and all the appellants were convicted upon certain counts.

The appeal has nothing to do with the merits of the case. No attempt has been made to say that there was any misdirection on the part of the learned Judge or that there was any misreception of evidence or that, on the main point,

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG. DENNIS GARTON FRENCH. FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

there was anything which could be said to point to a miscarriage of justice, except in one respect. The appeal has been launched on a variety of grounds, one of which we dealt with today before we heard Mr. Casswell on the main point of this appeal. Among other things, it was said at a very late stage that the jury had not been kept properly in charge of a bailiff. It was unfortunate that, through some extraordinary blunder, a police officer who was called on Monday last as being the jury bailiff was not the jury bailiff in this case at all. One can understand that, when this sort of point arises several months after the hearing of a case, the question which particular officer acted as bailiff may give rise to some mistake, as it did in this case. It was quite obvious that the police officer who was called on Monday had been the jury bailiff not in this case, but in another case, which was tried earlier in the assize, and his evidence was entirely and absolutely mistaken and wrong when he said he had anything to do with this case.

Having now heard the officer who was the jury bailiff in this case, the Court is abundantly satisfied that there was no irregularity at all and that the jury were kept properly and safely during their deliberations. Also we are quite satisfied that there was no irregularity whatever on the part of the Judge's clerk in this matter. What happened was that the jury, in the course of their deliberations, desired to ask a question of the learned Judge. The Judge by that time had gone to his lodgings which, as everybody who knows the court at Chelmsford will remember, are very close to the court, just across the road. The Judge directed his clerk to go over to the court and ask the jury to put their question into writing. The jury did put their question into writing, and it was handed to the bailiff. We are quite satisfied that the Judge's clerk did not enter the jury room. Even if he had, we do not think that that would have been in itself an irregularity, because the Court always has power to allow somebody to make a communication to the jury, if it is a communication proper to be made, and if it is made by the direction of the Court. Everyone knows that the oath that is given to a jury bailiff is that

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG.
DENNIS GARTON FRENCH.
FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

he " shall suffer no person to speak to them nor speak to them [himself] unless it be to ask whether they are agreed upon a verdict, without leave of the Court ". That has been the jury bailiff's oath, I should think, for at least 100 years or perhaps longer, though it was altered at one time because the jury bailiff used to be sworn to keep the jury without light, food or water. It was not, I think, till 1860 that the jury were allowed to get refreshment at their own expense, and the jury bailiff's oath now leaves out those words.

The learned Judge came over to the court immediately after he had written his answer to the question, and the answer was taken back to the jury. The learned Judge has reported to us that he intended to announce in court at once what the question and answer were, but the jury came back into court before he had the opportunity of doing so, and he accepted their verdict. It would have been much better if, before the jury had given their verdict, the learned Judge had said what the question and answer were. We desire to say that we are in no way departing from the rules which have been laid down in this Court and that the right practice to follow is this: If a jury, when they are considering their verdict, wish to ask a question or to have more information or to make any request about the case, they should do so in open court, and the Judge should answer in open court in the presence of the prisoner. A jury may, of course, put the request into writing or be asked by the Judge so to do, but the communication should always in such a case be read and answered in open court. It is entirely in the Judge's discretion whether he asks or permits counsel or the prisoner, if undefended, to address him on the jury's communication. The question that was asked by the jury in this case was whether they could convict the prisoner Pickard of stealing some, but not all, of the property. That is a question which sometimes is asked by juries, and the only answer is: Yes, of course you can. It would have been better if that question and his answer (which was " Yes, certainly, if that was what you found ") had been read out by the learned Judge before the jury actually returned their verdict. The

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG.
DENNIS GARTON FRENCH.
FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

question and answer were read out by the learned Judge in court after the jury returned their verdict.

The position, therefore, was that there had been no secrecy. The sort of question that has arisen in this case has to be considered in relation to the rule which has always been laid down in criminal law, and indeed in civil law, that all proceedings in court must be open and in public. The question that was asked in this case was an elementary one upon which no possible argument could have taken place, and, as the learned Judge has said, he would not have allowed argument on it, nor could there have been any argument.

Nevertheless, the prisoners are entitled to know what the question was, and they do know, because the learned Judge announced it in court in these words, after he had allowed the jury to be discharged. He said: " I will sentence these men tomorrow morning. The jury asked me to give them some assistance. Their question merely was this—I have not got it because I wrote upon it and sent it back to them—but it was merely a request to know whether, on count fifteen, on which they were satisfied that Pickard had stolen some property, they could say that they desired to say that he had not stolen all the property in the indictment, but only four out of the sixty articles; to which my answer was: ' Yes, certainly, if that was what you found '; that was all the question was about ".

Therefore it was announced in open Court what the question and answer were; and, it was not a case of a question that could possibly have given rise to any argument. The learned Judge, by having announced what the question and answer were in open court before the prisoners were sentenced, and therefore while the trial was still in being, gave every opportunity to the prisoners, if the question had been one on which it was open to them to argue, to come to this Court and say that that was a misdirection. No one pretends that they could have said that there was a misdirection in this case.

It is impossible to say that every irregularity is a ground for quashing a conviction. It may, and not infrequently does, happen that something is done in the course of a trial which

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG. DENNIS GARTON FRENCH. FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

is not strictly in accordance with recognised procedure. If that is so, the Court must consider whether or not it is an irregularity which goes to the root of the case, as, for instance, in the case which was cited to us by Mr. Casswell, NEAL, 33 Cr. App. R. 189; [1949] 2 K. B. 590, in which a jury, having been enclosed to consider their verdict, were allowed by the Recorder to leave the court and go and have their lunch in the town. That was such a grave departure from the recognised practice and procedure of criminal law that the Court felt that the verdict could not stand.

In GREEN, *ante*, p. 33, [1949] W. N. 488, a question had been sent by the jury to the learned Recorder at quarter sessions, and he had sent back an answer without ever announcing it in open court at all. When the case came before this Court, the Recorder could not remember what the question was, and therefore nobody was ever told or ever knew before the trial concluded what the question was. Accordingly, this Court felt obliged to quash the conviction, and in so doing I said (at p. 34 of the report in the *Criminal Appeal Reports*): "This Court and the Divisional Court has said on more than one occasion that any communication between a jury and the presiding Judge must be read out in court, so that both parties, the prosecution and the defence, may know what the jury are asking, and what is the answer. Very likely, in this case, it was purely immaterial, and if the Recorder had been able to tell us what the question was, we might have been able to consider it, although nothing that I say now should be taken in any way to authorise a departure from the well recognised rule that these matters must be done openly in court".

Then, after referring to BODMIN JUSTICES, [1947] K. B. 321, in which magistrates had called a witness into their room and asked him a question, so that nobody knew what the question was, because it was never stated in open court, until on an application for *certiorari* the justices filed an affidavit, and this Court held that the only thing to do was to bring up the conviction on *certiorari* and quash it, I continued (at p. 35):

1950.
Feb. 20, 24.

VINCENT HOWARD FURLONG. DENNIS GARTON FRENCH. FREDERICK JAMES PICKARD.

Goddard, L.C.J., Sellers, J., Devlin, J.

"In this case the Court feels the same difficulty. The communication made to the Recorder was not read out in court and the appellant, therefore, does not know what the communication was".

In this case we do know what the communication was. It was stated in court before the trial was concluded, and its nature was such that no possible argument could have been taken upon it in court if it had been read out before the jury gave their verdict and not after. We cannot say, therefore, that justice was not seen to be done. The jury gave their verdict, and the learned Judge told the parties what the communication was that they had sent, and what the answer was that he had sent back. For these reasons, in our opinion, there is no ground for quashing the conviction.

[The Court added that they could not interfere with the sentence on the appellant Furlong.]

Appeals dismissed.

Solicitors: Hamlin, Brown & Co., for the appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SELLERS.

JAMES FRANK RIVETT.

1950. *Feb.* 20, 21, 27

Murder—Insanity—Defect of Reason—Disease of the Mind—Responsibility for Actions—Medical Evidence—Issue one for Jury Alone—Trial of Lunatics Act, 1883 (46 & 47 *Vict. c.* 38), *s.* 2.

In considering whether a person is to be excused from the consequence of a crime on the ground of insanity, the question is not merely whether he was suffering from a defect of reason due to disease of the mind but whether the defect was such as to render him not responsible for his action.

The issue is one to be determined by a jury, and not by medical men of whatever eminence; and where a jury has found a prisoner Guilty despite strong evidence by medical men of the highest standing that he was insane at the material time, the Court of Criminal Appeal will not interfere with the verdict, unless it is satisfied that no reasonable jury could have found a verdict of Guilty in the particular case.

McNAUGHTON (1843), 4 St. Tr. (N.S.) 847 considered.

Appeal against conviction.

The appellant was convicted at Norfolk Assizes on January 27, 1950, of murder and was sentenced by Stable, J., to death.

The appellant was brought up at Suffolk Assizes, and the issue of the appellant's fitness to plead was there raised. A jury was sworn to try that issue and, after hearing evidence, decided that the appellant was fit to plead. The trial was then adjourned to Norfolk Assizes and the Judge allowed that issue to be tried again. Evidence was again called on that issue, and the jury found that the appellant was fit to plead. The appellant was then tried, and relied on the defence of insanity. Three eminent medical men were called by the defence and gave evidence to the effect that the appellant was insane at the

1950.
Feb. 20, 21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

material time. The full facts of the case are set out in the judgment.

Sir Charles Doughty, K.C. and *F. T. Alpe*, for the appellant.

Granville Sharp, K.C. and *R. N. Hales*, for the Crown.

Cur. adv. vult.

February 27.—THE LORD CHIEF JUSTICE: The judgment I am about to read is the judgment of the Court.

The appellant in this case was convicted of murder before Stable, J., at the last assizes for Norfolk and appealed to this Court against his conviction on the grounds, first, that the verdict was unreasonable and cannot be supported having regard to the evidence, and secondly, that the only proper verdict on the evidence was that he was Guilty of the act charged against him but was insane at the time when he did the act. At the close of the hearing on February 21 the Court dismissed the appeal, and now proceed to give their reasons.

The facts were that the prisoner, who is a builders' labourer aged twenty-one, had for some time been associating with the murdered girl, who was considerably superior to him in intelligence and education, and there is no reason to doubt that these two young people were fond of one another. That sexual intercourse had taken place on many, or at least several, occasions also there is no doubt, and in the opinion of the pathologist who examined the dead girl's body, probably on the evening when she met her death. Her parents did not approve of the association, and though they had never spoken to the appellant on the subject, there is no doubt from his own statements that he knew of their disapproval. On the night of the murder, November 5, the girl had gone to a picture theatre alone and left there about 8.30. Later, between 8.30 and 8.45, the appellant was seen in company with a girl walking towards the school where the deceased girl was a pupil, and it was not disputed that the girl with whom he was seen was in fact she who was murdered. He was next seen about 10 p.m.

1950.
Feb. 20,
21, 27.

JAMES
FRANK
RIVETT.

Goddard,
L.C.J.,
Humphreys,
J.,
Sellers, J.

walking alone quite normally, and about 10.40 he returned to his father's house where he lived. To his father he appeared normal and a little later on he went out. It appears that when he left the house he took with him a shot gun and some cartridges. By this time there is no doubt the girl was dead, and her body lying in a cycle shed to which he and she had gone, probably for the purpose of intercourse. About 11.20 the appellant called at the house of a friend still carrying the gun, and told him that he would not be seeing him any more as he had done his girl in. At first his friend did not believe him, but was finally convinced and asked him whether he would give himself up or leave a note and explain. The appellant said: " You can tell them who done it. Cheerio, goodnight ", and then walked off to the police station. It is to be observed that his friend apparently noticed nothing strange or unusual in the appellant's demeanour nor was any question put to him on that subject.

Arrived at the police station, the appellant said to the constable on duty: " You had better lock me up. I have just killed a girl "; being asked if he realised what he was saying, he said: " That is right. I am not kidding. I strangled her ". The constable took the gun from him and asked where the girl was, and the appellant told him she was in the cycle shed at the school. Later he said to the inspector: " I admit I killed the girl. I do not wish to say why I did it ". He was all this time quite calm, showing no emotion, and was put in a cell where he went to sleep. In the early morning of the next day he made a full and detailed statement to the detective-inspector, explaining exactly how he strangled the girl with her own scarf, his explanation being consistent with what was found when her body was examined. He told the inspector he had often had connection with her and that he had found out that her father wanted to tell him to lay off meeting her. He explained the gun by saying he thought about shooting himself. Later that day he was seen by a local medical practitioner, and while the doctor said that he made no detailed psychological examination, he saw no signs of any abnormal

1950.
Feb. 20, 21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

mentality. That he appeared detached and unconcerned did not strike the doctor at the time as remarkable owing to his acquaintance with the phlegmatic disposition of the labouring class in East Anglia, but he agreed that it was remarkable for even an East Anglian to sleep soundly after committing murder.

For the defence there was called a young girl cousin of the appellant, who said that some three or four years previously, when she was about thirteen years old, the appellant had told her he would never marry and would commit murder before he did, and that he would never join the Forces but would commit murder and be hanged for it, and would never have a twenty-first birthday as he would commit murder. She agreed that these things were said in a jocular way, that he was in the habit of making jesting remarks and that his behaviour, so far as she was concerned or knew, was always completely normal. No single witness spoke to ever having seen the appellant behave otherwise than as a normal sane man before the murder; his father who was called was neither asked nor said anything on the subject, nor did any witness who saw and spoke to him before or afterwards detect anything abnormal or remarkable in his demeanour, except that he went to sleep after he was put into the cell, if that is to be classed as remarkable.

It is now necessary to refer to what happened at the trial, which, at any rate in one respect, was somewhat unusual. Counsel for the prosecution informed the Judge when the prisoner was brought up at the Suffolk Assizes that he was instructed that there was a question as to the prisoner's fitness to plead; this was a perfectly correct course for the prosecution to take, and a jury was accordingly sworn to try that issue. I shall have to refer hereafter to the evidence then given, but at the moment will only say that following a careful and accurate charge by the learned Judge, the jury after over an hour's deliberation, found he was fit to plead despite the evidence of two medical men to the contrary. When that verdict was given, the prisoner was not arraigned, but the

1950.
Feb. 20, 21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

trial was forthwith adjourned to the Norfolk Assizes as there was not time to try the case before the Commission Day in that county. Seven days later at Norwich, counsel for the defence applied for this issue to be retried, and the learned Judge acceded to this request. It is by no means clear why he did so, as there seems to have been no suggestion to the Court that any change in the mental condition of the prisoner had taken place in the interval, and it appears to this Court that the issue, having once been tried and determined by a jury, ought not to have been re-opened. But of this, of course, the prisoner cannot complain. The evidence given was of exactly the same character as had been given at Bury St. Edmunds, but on this occasion the medical evidence was reinforced by that of Dr. Matheson, Medical Officer of Brixton Prison, and who, as is well known to all practitioners, gives evidence on the subject in a great number of cases at the Central Criminal Court and elsewhere. On this occasion, again after a perfectly accurate summing-up, the Norfolk jury took only ten minutes to find that the prisoner was fit to plead. A fresh jury was then empanelled, the prisoner was arraigned and pleaded Guilty. Stable, J., however, as he was well warranted in doing, directed a plea of Not Guilty to be entered, and the case was tried, the defence being (we need hardly say) simply one of insanity. In the end, after a summing-up which Sir Charles Doughty, who appeared for the appellant, stated was quite impeccable, the jury declined to find the prisoner insane and returned a verdict of Guilty.

The first observation that this Court would make is that three juries have refused to find the prisoner insane. We say this because the evidence that was given on the issue as to whether the prisoner was fit to plead was in substance exactly the same as was given on the trial. On the preliminary issue it is, of course, true that the jury did not have the full evidence as to the prisoner's movements and statements as did the jury who tried the case after issue joined, nor did they have the evidence of Dr. Grantham-Hill, the local practioner who was the first medical man to see him and who saw no sign of

1950.
Feb. 20,
21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

insanity. But they did have from the cross-examination knowledge of the detailed statements made by the prisoner giving his description (and an accurate description) of the crime. The evidence that he was unfit to plead was that he was suffering from schizophrenia, which is apparently a modern and perhaps more imposing name for what used to be called *dementia præcox*. This latter expression translated into English means defect of mind existing from an early age.

As I have said, the evidence on the preliminary issue was in substance the same as was tendered by the defence on the trial of the indictment, and for the purpose of the appeal we need only consider it from the latter standpoint. It is true that three medical men were called who stated that in their opinion the prisoner was insane; the only real difference between them was that, whereas two had said and repeated that the prisoner was unfit to plead, one of them while maintaining that the prisoner was insane at the time of the murder thought he was fit to plead. Their evidence amounted to this, that a man might be apparently and actually responsible before he committed a murder, or I suppose any other criminal act; that he might be responsible immediately after he committed the criminal act; but that at the moment when he committed it he was irresponsible, although he knew what he was doing when he did it. All the doctors agreed that he knew what he was doing; for the rest, their opinion was that he did not know it was wrong or that he did now know how wrong it was. But none of them ventured to say that a schizophrenic, or at any rate this schizophrenic, did not know that murder was wrong.

What could they point to as showing disease of the mind? That the prisoner disliked games at school; so do many boys. That he preferred his own company to that of other boys; anyone who has been at a boarding or any other school knows that is by no means an uncommon type. More serious, perhaps, is that he showed no emotion and smiled or grimaced when he was questioned about the tragedy, and that it was apparently a motiveless murder. Unhappily, our Courts are only too

1950.
Feb. 20,
21, 27.

JAMES
FRANK
RIVETT.

Goddard,
L.C.J.,
Humphreys,
J.,
Sellers, J.

familiar with cases where a couple have been indulging in sexual relations outside the bonds of matrimony when, because there is a likelihood, as here, that their illicit relationship will be brought to an end either by the girl's refusal or the intervention of her family, murder has resulted, it may be because the man resolves that no one else shall enjoy the pleasures that have been his or it may be that he has resolved to die with her, and then, having killed his sweetheart, has found his courage fail him at the last moment so that he has not used the weapon with which he has provided himself, but has given himself up to justice and become indifferent to his fate.

But the importance of this case, and it is one of importance, is that it gives this Court the opportunity to emphasise, if emphasis be necessary, two matters of cardinal importance in the criminal law. The first is that in considering whether a person is to be excused from the consequence of his crime, be it murder or any other, the question is not merely was he suffering from a defect of reason due to disease of the mind, but whether that defect was such as to render him not responsible for his action. We need not repeat the rules in McNAUGHTON (1843), 4 St. Tr. (N.S.) 847; they are so well known that it is unnecessary, but we will recall section 2 of the Trial of Lunatics Act, 1883, which enacts: "Where in any indictment . . . any act . . . is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, *so as not to be responsible, according to law*, for his actions at the time when the act was done . . . *then, if it appears to the jury before whom such person is tried*, that he did the act . . . but was insane *as aforesaid*", the jury may return a special verdict. If anything is required to emphasise that it is responsibility and not merely insanity that is the true test, the portions of the section that we have italicised supply the answer. This was one of the most important points discussed in McNAUGHTON'S CASE (*supra*). The direction of Chief Justice Tindal, a Judge whose eminence as a lawyer has been acknowledged by all

1950.
Feb. 20, 21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

succeeding generations, which was the subject of the debate, was, 4 St. Tr.(N.S.) at p. 925 : " If upon balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, he is then a responsible agent ", and this was held to be right. Now take a case which indeed seems to have been in the minds of the Judges who advised the House of Lords in MCNAUGHTON (*supra*): two men each believe wrongly that someone has done them a grievous injury; each of them then resolve that they will have revenge by killing or wounding the person they believe to be their enemy, and each know that killing or wounding is a criminal act. What difference can it make that in the one case the delusion or wrongful belief, call it what you will, is caused by a disease of the mind, and the other by too readily believing untrue information? Responsibility for the action must be the test.

The second matter for emphasis is that it is for the jury and not for medical men of whatever eminence to determine the issue. Unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after a proper direction by a Judge, that by the law of this country the decision is to be entrusted. This Court has said over and over again that it will not usurp the functions of the jury, though it may by virtue of the Criminal Appeal Act set aside a verdict if satisfied that no reasonable jury could have found a verdict of Guilty in a particular case. Here, no doubt, they had the opinion of medical men of undoubted integrity and whose qualifications none would question. But they had also the facts and the undisputed facts of all the surrounding circumstances. This is not a case where a scientific witness can say with certainty, as in the case of a bodily disease, from specific symptoms such as a rash, a coma or other physical sign that a disease exists. The jury have heard the indications that have led the medical witnesses to their conclusion; they have also heard all the other facts relating to the man and the crime, including the evidence of the doctor who saw the man very soon after it was committed. That he knew he had done

wrong is evidenced by the fact that he not only told his friend what he had done and indicated the consequences that would follow to himself, but gave himself up to the police for having committed murder. Let it be assumed he suffered from schizophrenia, or whatever doctors may call it; let it be assumed that he killed the girl on a sudden impulse; a jury of his country are satisfied that he was responsible, and it is not for this Court to say that he was not.

1950. *Feb.* 20, 21, 27.

JAMES FRANK RIVETT.

Goddard, L.C.J., Humphreys, J., Sellers, J.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BIRKETT.

GEORGE KELLY.

1950. *March* 6, 10, 15.

Trial—Juror—Alleged Disqualification—Conviction of Felony—Juror's Name in Jurors' Book—Juror Unchallenged and Sworn—Discovery of Alleged Disqualification after Conclusion of Trial—"Attainted"—Free Pardon—Civil Rights of Convicts Act, 1828 (9 *Geo.* 4, *c.* 32), *s.* 3—*Forfeiture Act*, 1870 (33 *&* 34 *Vict. c.* 23), *s.* 1—*Juries Act*, 1870 (33 *&* 34 *Vict. c.* 77), *s.* 10 (*as amended*)—*Juries Act*, 1922 (12 *&* 13 *Geo.* 5, *c.* 11), *s.* 2.

By section 10 of the Juries Act, 1870: ". . . no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, *nor any man who is under outlawry*, is or shall be qualified to serve on juries . . . in any court . . .". [The words in italics are repealed by section 20 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938.]

The name of a juror, who had been convicted of receiving stolen property and served a sentence of one month's imprisonment, appeared in the jurors' book prepared under section 1 of the Juries Act, 1922, as a person qualified and liable to serve. He was summoned, and his name having appeared on the panel, he was duly called, was not challenged and was sworn, and sat as one of the jury during a trial. After the

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

conclusion of the trial the fact of the juror's conviction was discovered, and it was contended on behalf of the appellant that the trial was rendered a nullity by the fact of that conviction.

Held, that the word "attainted", which related to the result of a judgment following on conviction or judgment on outlawry in cases of treason or capital felony, was to be distinguished from the word "convicted"; that, since the coming into force of section 1 of the Forfeiture Act, 1870, attainder could not occur except in the case of outlawry, which was abolished by section 12 of the Administration of Justice (Miscellaneous Provisions) Act, 1938; that the words "shall be" in section 10 of the Act of 1870 referred to conviction in the future of an infamous crime; and that as the juror had not been "attainted" of felony or convicted of an "infamous crime" as defined by section 46 of the Larceny Act, 1861, the trial had not been rendered a nullity by the fact of his conviction.

Semble, that the obtaining of a free pardon referred to in section 10 of the Juries Act, 1870, refers to the obtaining of an actual free pardon, and would not include the free pardon which arises by implication under section 3 of the Civil Rights of Convicts Act, 1828, on the endurance of the punishment imposed.

Semble, further, that the provisions of section 2 of the Juries Act, 1922, which provides that "Every person whose name is included in the jurors' book as a juror . . . shall be liable to serve as such, notwithstanding that he may have been entitled by reason of some disqualification or exception to claim that he ought not to be marked in the electors' list as a juror . . .", would also have prevented the trial from being a nullity; and that the only cases in which a trial will be treated as a nullity on the ground of the disqualification of a juror who has sat are cases where there has been either impersonation of a juror or a mistake as to the identity of a juror.

SUTTON (1828), 8 B. &. C. 417 approved.

TREMEARNE (1826), 5 B. & C. 254; MELLOR (1858), 1 Dears. & B. 468; and WAKEFIELD, 13 Cr. App. R. 56; [1918] 1 K. B. 216 considered.

Appeal against conviction.

The applicant was convicted at Liverpool Assizes on February 8, 1950, of murder and was sentenced by Cassels, J., to death.

At the trial one of the jury had five years previously been convicted of receiving stolen property and served a sentence

1950. *March* 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

of one month's imprisonment. The juror's name appeared in the jurors' book as a person qualified and liable to serve, and he was duly summoned to the assizes, where, his name having appeared on the panel of jurors, he was duly called and sworn without being challenged. The knowledge of his previous conviction did not come to the appellant's legal representatives until after the appellant had been convicted and sentenced.

Rose Heilbron, K.C. and *R. S. Trotter*, for the appellant: At common law conviction of felony disqualified a man from acting as a juror: *Hale's Pleas of the Crown*, 227; *Bacon's Abridgment*, 555; BROWN *v.* CRAWSHAW (1614), 2 Bul. 154. The same disqualification was made statutory by section 10 of the Juries Act, 1870, and it is submitted that the word " attainted " in that section is synonymous with " convicted ". [Lord Goddard, C.J. " Attainted " must at least imply that sentence has been passed.] Accepting that to render a man attainted, conviction must have been followed by sentence, the juror concerned in this case had been both convicted and sentenced. The fact that he had served his sentence, and was, for the purposes of section 3 of the Civil Rights of Convicts Act, 1828, in the position of a convict who has received a free pardon, does not render him a convict who had received a free pardon and whose disqualification had accordingly been removed for the purposes of section 10 of the Juries Act, 1870. The Act of 1828 was concerned with the personal rights of convicts, not with their public duties, and nothing in that Act can in any way diminish the common law and statutory prohibition against a person convicted of felony from serving on a jury. [Lord Goddard, C.J. In construing section 10 of the Juries Act, 1870, regard should be had to sections 12 and 20 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which repealed the part of the earlier section which relates to outlawry.] The fact of that limited repeal is significant. Parliament must have intended that the part of the section which relates to a juror being attainted should continue to have some effect, and it can be of no effect, in

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

view of the fact that the Forfeiture Act, 1870, which came into force some six months prior to the Juries Act, 1870, in substance abolished attainder, unless " attainted " be construed as synonymous with " convicted ". Where a juror who was disqualified has sat, the trial becomes a nullity. The authorities of MELLOR (1858), 1 Dears. & B. 468; HAY *v.* TOWER DIVISION JUSTICES (1890), 24 Q.B.D. 561, as reviewed in WAKEFIELD, 13 Cr. App. R. 56; [1918] 1 K. B. 216 (a case of personation) show that the irregularity is more than a matter for challenge. It is conceded that the Court has power in the case of a mis-trial to order a *venire de novo* and that it is in the Court's discretion whether it will do so.

William Gorman, K.C. and *Glynn Blackledge*, for the Crown:

There is a clear distinction between being convicted and attainted. Attainted means subject to attainder, and attainder refers to the results of judgment following on conviction. [He referred to the *Encyclopædia of the Laws of England*, Vol. I, tit. " Attaint " and *Wharton's Law Lexicon.*] The juror in this case was never attainted of felony nor convicted of an infamous crime, infamous crimes being only buggery and kindred crimes. It is significant that section 7 of the Juries (Ireland) Act, 1871, which was passed in the year after the Juries Act, 1870, uses the phrase " attainted or convicted ", showing that a distinction is to be drawn between the two. By the proviso to section 1 of the Forfeiture Act, 1870, outlawry proceedings were preserved, and sections 12 and 20 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, were concerned with the abolition of these; it was not necessary to repeal the rest of the section so far as attainder was concerned, because attainder had to all intents and purposes disappeared, except in the case of outlawry, under section 1 of the Forfeiture Act, 1870. Further the juror, having endured the punishment imposed, was in the same position as if he had obtained a free pardon, and therefore was not disqualified. Further, even assuming that the juror in

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

question was attainted, and that he had not obtained a free pardon, section 2 of the Juries Act, 1922, shows that, once the prescribed procedure has been followed and a person's name has appeared in the jurors' book, he must serve as a juror when called to do so, subject to any right of challenge, notwithstanding any claim which he may have put forward with regard to exemption, or that he was for any reason disqualified. In SUTTON (1828), 8 B. & C. 417, a disqualified alien sat on a jury, but the fact was not discovered till after the trial. It was endeavoured to obtain a new trial on this ground, but the Court declined to grant it. The only cases in which a new trial has been granted are cases where the identity of the person who sat as a juror was in issue, as was the case in WAKEFIELD (*supra*).

Rose Heilbron, K.C., in reply, referred to RAS BEHARI LAL *v.* THE KING (1933), 150 L. T. 3.

At the conclusion of the argument the Court adjourned, and after the adjournment, the Lord Chief Justice stated that, in the opinion of the Court, the objection to the validity of the trial must be overruled and that the Court would subsequently state in writing its reasons for its decision. The Court then heard submissions by counsel for the appellant in support of the substantive grounds of appeal, and dismissed the appeal.

March 15.—The following judgment of the Court was read:

THE LORD CHIEF JUSTICE: The appellant in this case was convicted of murder before Cassels, J., at the last assizes for Liverpool. He appealed to this Court alleging various grounds of misdirection, but when the case was first in the list for hearing on March 6, Miss Heilbron, on his behalf, asked leave to take a further point which had not been covered by the original notice, and she submitted that there had been a mis-trial in that one of the jurors was disqualified from sitting on a jury. The ground of disqualification alleged was that the juryman in question had been convicted of felony. It was said that under section 10 of the Juries Act, 1870, the conviction

1950.
March 6,
10, 15.

GEORGE KELLY.

Goddard,
L.C.J.,
Hilbery, J.,
Birkett, J.

constituted such a disqualification that the trial must be considered to have taken place not before twelve but only before eleven jurymen, that this would constitute a mis-trial, and the Court would be obliged to award a *venire de novo*.

This, indeed, would have been the result if this Court had been obliged to give effect to the objection, and a further trial would have had to take place. It is necessary to state that the name of the juryman in question, which for obvious reasons I do not mention, appeared in the jurors' book as a person qualified and liable to serve as a juror, that he was duly summoned, that his name appeared on the panel of jurors, and that he was duly called, was unchallenged and sworn. But it also appears that some five years ago he had been convicted of the felony of receiving stolen goods and sentenced to one month's imprisonment.

The first statute to which it is necessary to refer is the Juries Act, 1870, s. 10 of which is in these terms: "Provided always, and it is hereby enacted, that no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever". That Act in effect re-enacts the provisions of section 3 of 6 Geo. 4, c. 50, usually cited as the Juries Act, 1825. I pause here to say that counsel for the appellant contended that at common law a convicted felon was disqualified from serving on a jury, citing in support passages from *Hale's Pleas of the Crown* and other works of authority. The Court, however, is of opinion that since 1825 the qualifications and exemptions of jurors are governed by statute law and that we have not to consider what the law may have been and no doubt was in the time of Hale, but what provisions Parliament has made on the subject by the various Acts dealing with juries that have been passed from 1825 onwards. We are satisfied that the whole law now is statutory. The importance of this case is manifest as there are conflicting views disclosed in textbooks which deal with the matter, and the exact point

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

never seems to have been the subject of an express decision, although, as I shall explain before the end of this judgment, a point which is in our opinion indistinguishable was the subject of a decision by a Court of high authority in the year 1828 very soon after the first Juries Act had been passed.

It will be observed that section 10 of the Act of 1870 deals with three classes of persons, those attainted of treason or felony, those convicted of any crime that is infamous, in either case unless they shall obtain a free pardon, and those who were under outlawry. Outlawry has been abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938, and need no longer be considered. An infamous crime is shown by section 46 of the Larceny Act, 1861, to mean buggery, assaults with intent to commit buggery, both of which are felonies, and an attempt to commit buggery, which is a misdemeanour, and as the juryman in question had not, therefore, been convicted of a crime which was infamous, the remaining point to be decided was whether he was a person attainted of felony.

No doubt the distinction between " convicted " and " attainted " has often been regarded as distinguishing between the verdict of the jury and the sentence of the Court, but the true meaning of " attainted " relates to the result of a judgment following on conviction or judgment on outlawry in cases of treason or capital felony. If a person were convicted but no judgment was passed, attaint would not follow. The attaint was the result of the judgment in a capital case because thereby corruption of blood with all its consequences in the old law followed: see on this point the article on attaint in the *Encyclopædia of the Laws of England*, Vol. 1, the author of which was Sir William Anson.

The Juries Act, 1870, received the Royal Assent on August 9, 1870, and a month previously, namely July 4 of that year, the Act to abolish forfeitures for treason and felony was passed. The preamble states " Whereas it is expedient to abolish the forfeiture of lands and goods for treason and felony ", which (be it observed) as regards land was a consequence of an attaint,

1950.
March 6,
10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

and the Act goes on to provide in section 1 " From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry ". It is to be observed that the Act makes no distinction between verdict, conviction or judgment as the cause of the attainder. But it seems clear that after July 4, 1870, there was no such thing left in the law as attainder except in regard to persons who were outlawed or already under that disability at the time of the passing of the Act. It is true that in the Juries Act, 1870, the words are " who has been or shall be attainted of any treason, etc.", but in our opinion the words " shall be " must be taken as referring to a person who may in the future be convicted of any crime that is infamous. It is impossible to suppose that attainder could have remained for any purpose once it had been deliberately abolished by section 1 of the Forfeiture Act except in the case of outlawry. We cannot read for this purpose " a person attainted of felony " as meaning " a person convicted of felony " capital or non-capital, and the juryman in this case, although he had been convicted of the non-capital felony of receiving, was not attainted and therefore the objection cannot be sustained.

It is right that we should refer to one other matter which at one time rather impressed the Court. By section 12 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, outlawry proceedings were abolished, and by section 20 (3) it was provided that " The Acts mentioned in the first and second columns of the Fourth Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule ". Among the repeals are the proviso to section 1 of the Forfeiture Act which provided that " nothing in this Act shall affect the law of forfeiture consequent upon outlawry ", and the words in section 10 of the Juries Act, 1870, " nor any man who is under outlawry ". At first it seemed as though the fact that Parliament had expressly repealed only the words dealing with

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J. Birkett, J.

outlawry might be used as an argument that they intended to leave the rest of the section effective, but as, in the view of this Court, a person convicted after the coming into force of the Forfeiture Act was not attainted, whether the section is expressly repealed or not, it can have no effect.

In view of the conclusion at which we have arrived on this point, it is perhaps unnecessary to consider the argument that was addressed to us that a person who has served his sentence is to be regarded as having obtained a free pardon. By 9 Geo. 4, c. 32, s. 3, it is provided that every punishment for felony, after it has been endured, shall have the effect of a pardon under the Great Seal. We feel great doubt as to whether that section could be prayed in aid in interpreting an Act passed forty-two years ago. It seems a more reasonable interpretation that the obtaining of a free pardon contemplated in section 10 refers to the obtaining of an actual free pardon and not one implied by virtue of the statute of 1828.

While this is really enough to dispose of the objection, in view of the argument addressed to us, we think it right to refer to two more matters. The first is as to the effect of the Juries Act, 1922. Section 1 of that Act contains elaborate provisions for the preparation of the jurors' book and section 2 provides that " Every person whose name is included in the jurors' book as a juror . . . shall be liable to serve as such, notwithstanding that he may have been entitled by reason of some disqualification or exemption to claim that he ought not to be marked in the electors' list as a juror . . .". By section 8 (2) it is provided that " a person whose name is not included in the register of electors shall not be qualified or liable so to serve ", and there is a provision that a woman who is a vowed member of a religious order or community, although included in the jurors' book, shall not be liable to serve.

Although one would not expect a person disqualified, for instance, because he had been convicted of an infamous crime, to disclose that fact by claiming that he was disqualified, it seems to us that, as the statute of 1870 imposed a disqualification, whether the person concerned claimed or did

1950.
March 6, 10, 15.

GEORGE KELLY

Goddard, L.C.J., Hilbery, J., Birkett, J.

not claim exemption does not matter; if his name is included in the jurors' book, he is liable to serve. It is true his name might have been taken out if he had objected. It is true his name might not have been included if the registration officer was aware of his conviction, but it seems to us that the Act provides in terms that a person whose name appears in the jurors' book is liable to serve as a juror and that that again is an answer to the present objection.

There remains always the right of the accused person to challenge either peremptorily or, if he has exhausted his peremptory challenges, for cause. This right remains unaffected, but it is said: How could he challenge if he did not know? It is also contended that the cases show that where information has come to the knowledge of the accused after conviction with regard to the qualification of a juror, effect has been given to it by the Court and the trial treated as a nullity. It is perfectly true that there are such cases, but so far as this Court can ascertain, they have all been cases where there has been either impersonation of a juror or a mistake as to the identity of a juror. For instance, in TREMEARNE (1826), 5 B. & C. 254, on J. Williams being called to serve, his son, who was not on the panel and was under age and had no qualification, answered for his father and served on the jury. The Court, consisting of Chief Justice Abbott, afterwards Lord Tenterden, Bayley, Holroyd and Littledale, JJ., held that this was a fatal objection and that there was a mis-trial and made the rule absolute for a new trial. In SUTTON (1828), 8 B. & C. 417, it was sought to obtain a new trial on the ground that an unqualified alien had sat on the jury, which fact was not known to the defendant until after the trial. The only two Judges mentioned in the report were Lord Tenterden and Bayley, J., both of whom had been parties to the earlier case, but we think there can be no doubt that the other two Judges, Holroyd and Littledale, JJ., would also have been sitting; but whether they were or not, it appears that Lord Tenterden said (at p. 419): "I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged,

1950.
March 6, 10, 15.

GEORGE KELLY.

Goddard, L.C.J., Hilbery, J., Birkett, J.

if the party had an opportunity of making his challenge. In the case cited "—that is TREMEARNE (*supra*)—" no such opportunity had been afforded. We ought to be very careful in giving way to such an application, for if we must grant a new trial at the instance of a defendant after conviction, we must, also, do it at the instance of a prosecutor, when there has been an acquittal; and it seems to me that, without a precedent, we ought not to interfere in this late stage of the proceedings ".

We can see no difference between a case where the disqualification arose from the juryman being an alien and one in which it arises by reason of his being convicted. The ground of the decision seems to be that there was no doubt as to the identity of the person called and the prisoner was given his challenges.

In the case of MELLOR (1858), 1 Dears. & B. 468, there had again been personation or rather a mistake, for on a man of the name of Thorne being called, one Thorniley by mistake took his place and it was held to be a mis-trial. As late as 1918 there was before this Court WAKEFIELD, 13 Cr. App. R. 56; [1918] 1 K. B. 216, which was again a case of personation; but on the authority, among other cases, of TREMEARNE (*supra*) and MELLOR (*supra*) the Court set aside the verdict and ordered a *venire de novo*. So far as this Court has been able to ascertain, this result has only been achieved where there has been personation in one form or another. We can find no case in which, where there has been no doubt as to the identity of the person called, the Court has ever set aside the verdict.

Our attention was called to RAS BEHARI LAL *v.* THE KING (1933), 150 L. T. 3, a case before the Judicial Committee, where Lord Atkin certainly indicated that if the objection to a juror was not known at the time of the trial but arose afterwards, the Court would interfere. It is not, however, necessary for us to go further into that case which is not technically binding on us, though, of course, we should treat the decision with great respect, for not only are the facts very different from what they are here but, for the reasons that we have already given on other grounds, we are satisfied that this objection cannot prevail.

1950.
March 6,
10, 15.

GEORGE
KELLY

Goddard,
L.C.J.,
Hilbery, J.,
Birkett, J.

It is not without a sense of satisfaction that the Court has been able to come to the conclusion that it has in this case. While, no doubt, it is desirable that persons who have real criminal records should not serve on juries, if we had to give effect to this objection, it would mean that any juvenile who had been convicted of a petty theft would for the rest of his life be disqualified from serving on a jury, and whatever may have been the position in the time of Chief Justice Hale, it would indeed be disastrous if we now were obliged to hold that a conviction for a petty crime, technically a felony, conferred disqualification for life on the offender who might indeed have escaped with no more than a nominal penalty.

It is worth remembering that when the Juries Act, 1825, was passed all but the most petty felonies were capital, so that on conviction and judgment, attainder automatically followed. Though in 1823 the statute 4 Geo. 4, c. 48 empowered the Court to abstain from imposing the death penalty on persons convicted of any crime except murder, if the offender seemed to the Court a fit subject for the exercise of the Royal Prerogative of Mercy, it was not till 1826 that, at the instance of Sir Robert Peel, Parliament began to pass the series of Acts whereby the capital sentence was abolished for nearly all felonies, so that by 1870 it was only treason, murder, and setting fire to His Majesty's ships and dockyards that remained capital and in which attainder would follow.

As we indicated at the close of the argument, the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES AND MR. JUSTICE MORRIS.

FRANCIS STEPHEN JOHNSTONE.

1950. *March* 13.

Indictment—False Pretences—No Need to State to Whom Pretence Made—Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 3 (2), *Sched. I, Appendix to Rules, Form* 12.

In an indictment for obtaining property by false pretences it is no longer necessary to state to whom the pretences were made, and it is sufficient if Form 12 in the Appendix to the Rules contained in Sched. I of the Indictments Act, 1915 is followed.

SOWERBY, [1894] 2 Q. B. 173, not followed.

Application for leave to appeal against conviction.

The applicant was convicted at Surrey Quarter Sessions on December 5, 1949, of obtaining a cheque by false pretences, sentence being postponed.

It is unnecessary to set out the facts of the case, which is reported only on one point relating to the form of the indictment. The indictment followed Form 12 in the Appendix to the Rules contained in Sched. I of the Indictments Act, 1915, and did not state to whom the false pretences were made.

D. J. C. Ackner, for the applicant.

THE LORD CHIEF JUSTICE [after referring to other matters not material to this report]: Another point was taken, though not pursued, in support of the application. It was said that the indictment was bad because it did not state in so many words to whom the false pretence was made. In support of this, reference was made to *Archbold's Criminal Pleading, etc.* (32nd ed., p. 687), where it is stated that " the indictment must state to whom the pretences were made and from whom the goods, etc., were obtained, REG. *v.* SOWERBY, [1894] 2 Q. B.

1950. *March* 13.

FRANCIS STEPHEN JOHNSTONE.

Goddard, L.C.J., Jones, J., Morris, J.

173 ". The point taken was quite rightly not persisted in, because the Indictments Act, 1915, makes provision for the form of a count charging false pretences, and in the present case the count was in compliance with Form 12 in the Appendix to the Rules which appear in the Schedule to the Act. It is not accurate to say, as stated in *Archbold*, that the indictment must set out to whom the alleged false pretence was made, because the law has been altered by the Indictments Act.

In the present case no one who read the indictment could be in any doubt that it was intended to allege that the false pretences were made to the person from whom the cheque had been obtained.

Application refused.

Solicitors: Titmuss, Sainer & Webb, for the applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE JONES.

1950. *April* 3

FRANCIS O'NEILL.
ARTHUR ACKERS.

Evidence—Cross-Examination—Charge Made against Witness by Way of Defence—Prisoner not Called.

It is improper for counsel to make a charge against the police or any other witness by way of defence, as distinct from cross-examining the witness as to credit, if he does not intend to call his client to give evidence to support the charge.

Applications for leave to appeal against conviction.

The applicants were convicted at Liverpool Assizes on February 20, 1950, of conspiracy to rob with violence and

1950.
April 3

FRANCIS O'NEILL.
ARTHUR ACKERS.

Goddard, L.C.J., Humphreys, J., Jones, J.

assault with intent to rob and were sentenced by Oliver, J., O'Neill to four years' imprisonment and Ackers to six years' preventive detention.

The applicants had made statements to the police which were tantamount to confessions, but it was suggested to the police officers in cross-examination by defending counsel that these statements had been extracted from the applicants by threats and physical violence on the part of the police. Neither of the applicants was called to give evidence.

No counsel appeared.

THE LORD CHIEF JUSTICE: These two applicants along with a youth named Hamilton were convicted of conspiracy to rob with violence and assault with intent to rob.

Ackers, who is a man with a very bad record, and O'Neill, also a man with a bad record but not quite so bad as Ackers', got the assistance of Hamilton, who does not appeal against his sentence, to assist them in robbing with violence a shopkeeper. It was an astonishing case. Mr. Barton was a shopkeeper and evidently a man of a somewhat charitable disposition, and on the afternoon of the day in question Hamilton, at the instigation of the other two men, went into his shop and told him that he was starving, and that he had no money, no work and nowhere to go. Mr. Barton was sorry for the boy and gave him some food and let him stay in the shop. He also gave the boy two shillings and told him that he could get a bed at a hostel. It is quite clear that Hamilton was sent there to spy out the land. Then he went away, and there is no doubt he went away to report to the two applicants. About an hour afterwards he came back and said that he had booked a bed, but that it was too cold to stay at the hostel and he asked Mr. Barton to let him stay by the fire. Mr. Barton did let him stay by the fire and he was in the house altogether for something like five hours. Then Mr. Barton was anxious that he should leave, whereupon another knock came at the door and in walked the applicant O'Neill. Hamilton said: "Let him come in; he has nowhere to go", and asked

1950.
April 3

FRANCIS O'NEILL.
ARTHUR ACKERS.

Goddard, L.C.J., Humphreys, J., Jones, J.

whether O'Neill could stay there. Mr. Barton said No, and he was then hit a severe blow on the back of his head by Hamilton. By this time Ackers had come on the scene and Mr. Barton was very badly hurt. His head was severely damaged and he was bleeding. He ran out into the street with Hamilton still coming behind him and still hitting him. Then Hamilton seems to have more or less repented, and he came in next day and apologised for what he had done; and then he was arrested. When he was arrested, he proceeded to make allegations of indecency against the man in respect of whom it can only be said that he was too trusting in letting the youth stay in the shop and in giving him money. Hamilton then proceeded to give away the whole story and O'Neill and Ackers were subsequently seen by the police.

They made statements which, although they tried to excuse themselves on the ground that they did not actually hit Mr. Barton, showed quite clearly that they were in the conspiracy, that they had sent Hamilton to do the hitting and were there when he did the hitting, and therefore, of course, were equally guilty with him. There is no ground whatever for these applications and, indeed, they are impudent; but the importance of this case is that it appears from the transcript that Ackers especially, through his counsel, alleged that the statement was dragged out of him and obtained by threats and violence on the part of the police. That is an exceedingly serious matter. To say, as is too often said, that the police threatened and pummelled and beat a prisoner to get a statement out of him is about as serious an accusation as can be made against the police. If there was any foundation for the allegation, it would have to be investigated, and if it was found to be true, the police officers concerned would be dealt with both criminally and also by being dismissed from the Service.

However, what the Court desires to call attention to is this: having suggested this in cross-examination to the police, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the Court has no hesitation in saying that that is

1950.
April 3

FRANCIS O'NEILL. ARTHUR ACKERS.

Goddard, L.C.J., Humphreys J., Jones, J.

not the proper practice. It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence—because, of course, it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means—if he does not intend to call his client to give evidence to support the charge.

In this case, a violent attack was made on the police. It was suggested that they had done improper things, and indeed, Ackers repeats that suggestion in his notice of appeal. The applicants had the opportunity of going into the box at the trial and explaining and supporting what they had instructed their counsel to say. They did not dare to go into the box, and, therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. It is one thing to cross-examine properly and temperately with regard to credit, though it is very dangerous to do so unless you have material on which to cross-examine, and with which you can confront the witness. It is, however, entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them. The Court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a defence but which, if there is nothing to support them, ought not to be pursued.

Applications refused.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE JONES.

1950. *April 4.*

R. *v.* MIDDLESEX QUARTER SESSIONS AND ANOTHER. *Ex p.* DIRECTOR OF PUBLIC PROSECUTIONS.

Quarter Sessions—Indictable Offence—Conviction by Court of Summary Jurisdiction—Committal for Sentence—Offence Not Triable on Indictment at Quarter Sessions—No Power in Quarter Sessions to Pass Sentence—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *ss.* 1, 2 (5)—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29 (1), (3) (a).

By section 29 (1) of the Criminal Justice Act, 1948, a court of summary jurisdiction which has convicted an offender of an indictable offence tried summarily by it may commit him to quarter sessions for sentence, if the Court, on being informed of his character and antecedents, deems its own powers of punishment for the offence insufficient. By section 29 (3) (*a*) quarter sessions "shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment".

A court of summary jurisdiction tried and convicted an offender for an offence under section 1 of the Prevention of Corruption Act, 1906. By section 2 (1) of that Act such offences are not triable on indictment at quarter sessions. On being informed of the offender's bad record, the justices committed him to quarter sessions for sentence under section 29 (1) of the Act of 1948. Quarter sessions took the view that, as they could not have convicted the offender of the offence on indictment, they had no power to pass sentence on him under section 29 (3) (*a*) of the Act and declined to adjudicate.

Held, that the view of quarter sessions was correct.

Indictable offences of a grave nature should not be dealt with summarily merely because justices have the power so

to deal with them, even though they can commit to quarter sessions for sentence. Such offences should be sent for trial to quarter sessions or assizes.

1950.
April 4.

R. *v.* MIDDX. QUARTER SESSIONS; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Jones, J.

Application for an order of *mandamus*.

On February 17, 1950, a court of summary jurisdiction at Wealdstone convicted the respondent, Samuel Goldman, of an offence under section 1 of the Prevention of Corruption Act, 1906, which is not triable on indictment at quarter sessions. On February 24 they committed him to Middlesex Quarter Sessions for sentence under section 29 (1) of the Criminal Justice Act, 1948. The appeals committee of quarter sessions held that, as they would have had no power to try the offender for such an offence on indictment, they had no power to sentence him under the Act of 1948, and declined to adjudicate. The Director of Public Prosecutions applied for an order of *mandamus* directing the appeals committee to hear and determine the case.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *Christmas Humphreys* and *F. H. Lawton*, for the applicant.

T. F. Southall, for the appeals committee.

James Burge, for the respondent Goldman.

THE LORD CHIEF JUSTICE: In this case the Attorney-General has moved for an order of *mandamus* directed to the Appeals Committee of Middlesex Quarter Sessions to hear and determine a case brought before them under section 29 of the Criminal Justice Act, 1948. The history of this section is now pretty well known. Before the passing of the Criminal Justice Act, 1948, there had been two cases in the Court of Criminal Appeal, SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 223, and GRANT (1937), 26 Cr. App. R. 8, in which the prisoner had been brought before justices and had elected to be dealt with summarily for an indictable offence. The justices consented to deal with the case summarily. In the first case the justices

1950.
April 4.

R. *v.* Middx. Quarter Sessions; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Jones, J.

heard the evidence and convicted the prisoner. In the second case the prisoner pleaded Guilty. On hearing the prisoners' records, which were very bad, the justices did not consider that the maximum of six months' imprisonment which they could give under the Summary Jurisdiction Acts was a sufficient punishment. They accordingly decided in each case to commit the prisoner for trial at quarter sessions. At quarter sessions, in each case the plea of *autrefois convict* was put in, and it was held by the Court of Criminal Appeal in each case that that plea was good, because there had been a conviction, although the Court had not proceeded to sentence. Accordingly, when the Act of 1948 was passed, an entirely new procedure was introduced, and it was provided, generally speaking, that where an indictable offence was dealt with summarily, the magistrates could deal with it summarily so far as the conviction was concerned, and then if, when they heard the prisoner's record, they did not think their powers were adequate to give proper punishment, they could send him forward to quarter sessions for sentence.

The provision that has given rise to the difficulty in this case is this: section 29 (1) of the Act provides that "The Court may, in lieu of dealing with him in any manner in which the Court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section". Provision is then made for the Court to which he is to be sent, and sub-section (3) provides: "Where an offender is so committed for sentence as aforesaid, the following provisions shall have affect, that is to say: (*a*) The appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment".

The facts of this case are that one Samuel Goldman was charged before justices sitting as a court of summary jurisdiction with an offence under the Prevention of Corruption Act, 1906. Under that Act a person guilty of the offences which

1950.
April 4.

R. *v.* MIDDX. QUARTER SESSIONS; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Jones, J.

are therein described is " guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment . . . for a term not exceeding two years, or to a fine not exceeding £500, or to both such imprisonment and such fine, or on summary conviction to imprisonment . . . for a term not exceeding four months, or to a fine not exceeding £50, or to both such imprisonment and such fine ". In other words, offences under that Act are offences which may be dealt with either on indictment or on summary conviction, and there are two different penalties prescribed. It is not a case of an indictable offence being dealt with summarily on the election of the prisoner, as is in the case, for instance, on a charge of larceny or false pretences. There are the two separate provisions—the prisoner may be dealt with either on indictment or in a court of summary jurisdiction.

Section 2 (1) of the Act of 1906 provides that a prosecution for an offence under the Act can only be instituted with the consent of the Attorney-General; then it is provided in sub-section (5): " A court of quarter sessions shall not have jurisdiction to inquire of, hear and determine prosecutions on indictments for offences under this Act "; and in sub-section (6), " Any person aggrieved by a summary conviction under this Act may appeal to a court of quarter sessions ".

It is curious that there should be an offence created by statute which can be dealt with by a court of summary jurisdiction, but, if the prisoner is committed for trial, may not be dealt with by justices sitting in quarter sessions, who have power to hear an appeal from a court of summary jurisdiction. The justices in this case, having heard the prisoner's record, sent him forward to quarter sessions for sentence, purporting to act under section 29, but quarter sessions took the view that they had no power to sentence him.

In the opinion of the Court, quarter sessions were right in their view. It no doubt is a *casus omissus* in the Act. The Act says that quarter sessions " shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been

1950.
April 4.

R. *v.* MIDDX. QUARTER SESSIONS; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Jones, J.

convicted of the offence on indictment". The respondent in this case could not be dealt with by quarter sessions under that section, because he could not have been tried and could not have been convicted on indictment before them. It may be that Parliament intended that any case which could be dealt with summarily could be dealt with by a court of quarter sessions under this section. The difficulty is that they have not said so. They have expressly limited the case in the way described by the words used, and, as this is an entirely statutory procedure, it is obviously necessary that the provisions of the statute should be complied with strictly.

We have been given an interesting list by the Attorney-General of the other cases in which this same point may arise. It may very likely be, therefore, that if the attention of the Legislature is called to this difficulty which has arisen, the Legislature may see fit to put this matter right, but, as it is, we think that the point which has been taken is a good one.

I would like to direct attention to one other matter. On many occasions on which I have given addresses to magistrates at assizes, or at meetings of magistrates, I have over and over again called their attention to the fact that because magistrates have power to deal with a case summarily, that is by no means a reason why they necessarily should do so. It is not only a question of sentence. Many cases brought before magistrates, which they can deal with, are of a very grave character, and ought to be sent for trial. There may be matters of mitigation in the case, so that the magistrates may think (and it may turn out) that the Court before whom the case is brought in the end perhaps may only pass a nominal sentence, or may even bind the prisoner over. That, however, is not the point. Serious cases ought to be dealt with by the superior courts, and I hope that because Parliament has introduced this new method, prosecutors will not, for the sake of saving the trouble, or some reason of that sort, consider it sufficient to get magistrates to deal with cases, and then commit for sentence. Grave cases ought to be dealt with by a court of assize or a court

1950.
April 4.

R. *v.* MIDDX. QUARTER SESSIONS; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Jones, J.

of quarter sessions. Here a man was found guilty by magistrates of what apparently appears to be a very serious offence —offering a Food Enforcement Officer a bribe of £80—and other convictions are recorded against him. Why the Director of Public Prosecutions or his representative agreed to have the case dealt with summarily, I do not know. It is a case which ought to have gone for trial. I hope that notice will be taken by magistrates of the fact that, when serious cases are brought before them, it is not enough to say: "We have got power to deal with the case, therefore we will deal with it". They ought to consider whether it is not a case which should go forward to a court of assize or a court of quarter sessions as being the proper Court to deal with serious cases.

This application consequently fails, and will be dismissed.

HUMPHREYS, J.: As far as I am concerned, that is the judgment of the Court.

JONES, J.: I agree.

Application refused.

Solicitors: Director of Public Prosecutions, for the applicant; C. W. Radcliffe, for the appeals committee; Lucien Fior, for the respondent Goldman.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MORRIS AND MR. JUSTICE FINNEMORE.

FRANK WILLIAM LEDGER.

1950.
May 2.

Sentence—Corrective Training—Arrangements for Serving Sentence —Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

Statement of arrangements now in existence for serving sentences of corrective training.

1950.
May 2.

FRANK WILLIAM LEDGER.

Goddard, L.C.J., Morris, J., Finnemore, J.

Appeal against sentence.

The appellant was convicted at Boston County Magistrates' Court on February 28, 1950, of larceny and was sentenced by Holland Quarter Sessions Appeals Committee on March 17, 1950, to four years' corrective training.

No counsel appeared.

THE LORD CHIEF JUSTICE: In our opinion the reason why the Judge in Chambers has given leave to appeal against a sentence of corrective training in this case was that he thought that the Court would not willingly or knowingly have ordered the appellant to serve a sentence which in practice would be one of four years' imprisonment. At the time when the Judge gave leave to appeal the Judges had been unable to obtain any very clear information on what was happening to prisoners who were sentenced to corrective training. Corrective training is a new form of punishment introduced by the Criminal Justice Act, 1948, and the sections which deal with it came into force in 1949. The Judges of this Court have been somewhat disturbed because they found out that, at the time when those sentences could first be given, accommodation had not been provided in different prisons for corrective training, and accordingly it seemed to the Court that a sentence of corrective training was in no way different from a sentence of imprisonment.

We have recently had the advantage of meeting the Prison Commissioners, who attended a meeting at which all the Judges in London were present, and I am making the present statement so that quarter sessions may have the advantage of knowing what the Judges now know—namely, that arrangements have been made, and are in fact in force, by which corrective training can be, and is being, given in different conditions from those which prevailed under ordinary sentences of imprisonment. I do not mean to say, and it would be very undesirable if quarter sessions were to think, that corrective training should be looked on as a sentence which is not in one sense a sentence of imprisonment, because it is; it is served in

1950.
May 2.

FRANK WILLIAM LEDGER.

Goddard, L.C.J., Morris, J., Finnemore, J.

prisons and, in the ordinary way, the usual one-third remission will be given unless the prisoner grossly misconducts himself. It has the advantage—and it is a great advantage—that when he comes out the prisoner will be under the charge of the Aftercare Association whose duty it will be to see if they can find him work and give him a helping hand and keep him under observation generally.

The prisons which have been set aside for corrective training are Reading, as a selection and distribution centre, two wings at Wormwood Scrubs, two wings at Liverpool Prison, the whole of Chelmsford Prison, and recently a wing at Durham Prison. During June there will also be opened an establishment for this purpose at Nottingham. The Court is, therefore, now satisfied that the discipline and effect of a sentence of corrective training are different from the discipline and effect of a sentence of simple imprisonment.

We can, however, well understand that when the present case was before the single Judge to whom it was referred and was dealt with by him before the Judges had had the advantage of hearing the details of the arrangements from the Prison Commissioners, he may well have thought (as we all did in fact) that the arrangements for corrective training were in what might be called such a nebulous or rudimentary condition that there was really no difference between corrective training and imprisonment. We are now satisfied that there is a difference, and we think that the case before us is exactly the kind of case which Parliament meant should be dealt with by that particular form of punishment which they have provided. The appeal will be dismissed.

Appeal dismissed.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, MR. JUSTICE BYRNE, MR. JUSTICE MORRIS AND MR. JUSTICE FINNEMORE.

1950.
May 3.

R. *v.* NORFOLK JUSTICES AND ANOTHER. *Ex p.* DIRECTOR OF PUBLIC PROSECUTIONS.

Justices—Committal to Quarter Sessions for Sentence—Invalid Committal—Refusal of Quarter Sessions to Adjudicate—Fresh Summonses for Same Offences Calling on Defendant to Appear Before Justices for Sentence—Refusal of Justices to Accept Jurisdiction—No Final Adjudication by Justices—Justices Not Functi Officio*—Notice to be Given Defendant Calling on Him to Attend Further Hearing—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 28, 29.

A defendant appeared before a Court of summary jurisdiction to answer seven summonses charging bankruptcy offences under the Bankruptcy Act, 1914 (as amended). At the request of the prosecution, the justices dealt with the offences throughout, under section 28 (1) of the Criminal Justice Act, 1948, as summary offences, and convicted on all the charges. The defendant then asked for six other similar offences to be taken into consideration, and the justices thereupon decided to commit the defendant to quarter sessions for sentence, and admitted him to bail (which they had no power to do). The committal was invalid, as the offences fell within section 28 (1) of the Criminal Justice Act, 1948, and not under section 28 (2) of that Act or the Schedule to the Criminal Justice Act, 1925, and quarter sessions, being of that opinion, made no order except to discharge the defendant's bail. Fresh summonses were issued for the same offences as were alleged in the original summonses, calling on the defendant to appear to be sentenced for the offences of which he had been convicted. On the day on which those summonses were returnable, the justices heard representations from the defendant's solicitor, and refused to proceed further with the matter.

Held, that *mandamus* must issue directing the justices to impose a sentence on the defendant in respect of the offences of which they had convicted him, since, inasmuch as they had not yet finally adjudicated on the case, they had not

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

proceeded to judgment and were not *functi officio*; and that, to secure the appearance of the prisoner before the justices, notice should be given to the prisoner that on a named day the justices would proceed further to hear the case and consider the appropriate sentence to be passed, and requiring the defendant to attend.

KENWORTHY (1823), 1 B. & L. 711, applied.

Application for order of *mandamus*.

At a Court of summary jurisdiction for the petty sessional division of South Greenhoe, Norfolk, one Leonard Pocock (the defendant) appeared to answer seven summonses charging bankruptcy offences under the Bankruptcy Act, 1914 (as amended). At the request of the prosecution, the justices dealt with the offences, under section 28 (1) of the Criminal Justice Act, 1948, as summary offences, and on December 5, 1949, decided to convict on all the charges. The defendant then asked for six other similar offences to be taken into consideration. The justices then decided to commit the defendant to Norfolk Quarter Sessions for sentence under section 29 of the Criminal Justice Act, 1948, and admitted him to bail. Both the prosecution and defence acquiesced in this course. Quarter sessions took the view that the committal was bad, on the ground that the offences fell within section 28 (1) of the Criminal Justice Act, 1948, having been dealt with throughout as summary offences, and made no order except to discharge the defendant's bail. The Director of Public Prosecutions issued fresh summonses for the same offences as were alleged in the original summonses and calling on the defendant to appear to be sentenced for the offences of which he had been convicted. The summonses were returnable for February 27, 1950, on which day the justices sat again, but on hearing representations from the defendant's solicitor, decided not to proceed further with the matter.

At the instance of the Director of Public Prosecutions, an application was made for an order of *mandamus* directing the justices to hear and determine according to law the charges against the defendant, or, alternatively, directing them to

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J. Byrne, J., Morris, J., Finnemore, J.

impose a sentence on him in respect of the offences of which they had convicted him.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Harold Brown*, for the Director of Public Prosecutions:

The justices were not *functi officio*, inasmuch as the committal failed on the ground that it was a nullity, and therefore proceedings before the justices had not been concluded. Secondly, though in a case where justices have released a defendant on probation and the Divisional Court has said that that course ought not to have been taken, there is no statutory indication of the manner in which the defendant is to be brought back before the justices, it is submitted that the justices must have an inherent power, derived from the common law, to summon him to attend. Thirdly, no plea of *autrefois convict* can be raised before the justices in this case, because there will be no question of the defendant being called on to plead or being tried on the fresh summonses.

Christmas Humphreys, for the justices:

The justices will welcome the direction of the Court by way of *mandamus*. Hitherto they have merely taken a safe course, because they were uncertain as to their powers. Once it is clearly established what their powers are, they are most ready to exercise them.

J. P. Widgery, for the defendant:

It is an established principle of law that once a Court has given judgment, there can be no alteration of that judgment save on appeal. Here the decision of the justices was a judgment. There had been a valid conviction and the justices had made an order by way of disposal of the case. Accordingly, even though that order was outside their jurisdiction, the justices were *functi officio*, and no further proceedings can be taken. The case is similar to one where justices have imposed a penalty which they had no power to impose, as in WILLESDEN JUSTICES; *Ex parte* UTLEY, [1948] 1 K. B. 397. In such cases

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

this Court has always quashed the conviction without ordering any further proceeding in the matter.

THE LORD CHIEF JUSTICE: In this case Mr. Attorney moves for an order of *mandamus* directed to the justices for the petty sessional division of South Greenhoe in the county of Norfolk "to hear and determine according to law the charges against one Leonard Pocock, set out or referred to in the statement and affidavit hereinafter mentioned; alternatively to direct the said justices to impose a sentence upon the said Leonard Pocock in respect of the offences of which they have convicted him . . .". Before dealing with the facts of this case, I desire to make a few general observations upon sections 28 and 29 of the Criminal Justice Act, 1948, because it is by reason of the provisions of those sections that the questions which fall for determination arise.

It would be convenient first to state the various offences in respect of which justices sitting in petty sessions have power to adjudicate. I leave out entirely cases where justices are sitting as examining justices for cases triable only on indictment. Apart from these, there are first of all offences which are made by statute summary offences only. In those the justices must adjudicate themselves and no other Court has power to adjudicate. Secondly, there are offences which by statute can be dealt with either summarily or on indictment; thirdly, there are offences generally referred to as offences under section 17 of the Summary Jurisdiction Act, 1879, which are *prima facie* summary offences, but in which the sentence that may be imposed exceeds three months and the defendant has, therefore, the right to claim to be tried by jury. Fourthly, and most important, are the indictable offences set out in the Schedule to the Criminal Justice Act, 1925, which, if the defendant consents and the justices and the prosecution raise no objection, or if despite objection by the prosecution the justices so determine, can be dealt with as summary offences.

It was in respect of those last-named offences that difficulties arose in Courts of summary jurisdiction. Before the Act of

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

1948 in two cases which came before this Court, SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 223, and GRANT (1937), 26 Cr. App. R. 8, justices had agreed to deal with an indictable offence summarily, and having decided to convict and announced their intention of convicting in one case and in the other case after a plea of Guilty, after hearing the character of the accused they came to the conclusion that he ought to receive a more severe sentence than they had power to give; whereupon they committed him for trial. In each case, when the prisoner came for trial at quarter sessions, objection was taken that he had been already convicted, and a plea of *autrefois convict* was entered, but was found not to be established. It was held by this Court in each case that that plea was a good plea in bar, as the prisoner had already been convicted and quarter sessions, therefore, had no power to try him over again.

In an endeavour to remove that difficulty, section 28 (2) of the Act of 1948, deals with indictable offences which may be dealt with summarily with the consent of the accused, and so on. Then, by section 29, it is provided: " (1) Where, under subsection (2) of section 28 of this Act or section 24 of the Criminal Justice Act, 1925, a person who is not less than seventeen years of age is tried summarily by a Court of summary jurisdiction for an indictable offence, and is convicted by that Court of that offence, then if, on obtaining information as to his character and antecedents, the Court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that Court has power to inflict, the Court may, in lieu of dealing with him in any manner in which the Court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section ". That removed the difficulty which had arisen in the cases of SHERIDAN (*supra*) and GRANT (*supra*): justices have now the power to hear the case and to decide whether or not to convict, and if they do decide to convict, they have the power, if they think fit after hearing the prisoner's antecedents, to send him to quarter sessions for sentence. But, so far as section 28 is concerned, that power only exists where

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

the case is one which falls within sub-section (2). That sub-section provides: "Where the Court has begun, in accordance with the last foregoing sub-section, to hear a case as if the offence were punishable on conviction on indictment only, then if at any time during the hearing it appears to the Court, having regard to any representations made in the presence of the accused by or on behalf of the prosecutor, or made by or on behalf of the accused, and to the nature of the case, that it is proper to do so, the Court may then determine (subject to the following provisions of this section) to try the case summarily".

Sub-section (1) of section 28 provides: "Subject to the provisions of this section, where a person who is not less than fourteen years of age is charged before a Court of summary jurisdiction with an offence which, by virtue of any enactment, is punishable either on summary conviction or on conviction on indictment, then if application in that behalf is made by the prosecutor before the charge has been entered upon, the Court may then determine to try the case summarily; but if the Court does not so determine it shall proceed to hear the case as if the offence were punishable on conviction on indictment only". That sub-section, of course, deals with a variety of offences; a very common one is driving to the danger of the public, which may be dealt with either summarily or on indictment, or (as in the case with which we are concerned today) certain offences under the Bankruptcy Act, 1914, which by the terms of the Act may be dealt with either summarily or on indictment. If justices proceed under sub-section (1) to deal with these as summary offences, they are summary offences only.

Therefore it is quite clear, and it is not argued to the contrary, that in respect of that class of offence, where justices have decided to try the case summarily, section 29 (1) has no application. It deals only with offences which are indictable and can only be dealt with summarily with the consent of the accused.

In this case seven charges of offences against the Bankruptcy Act, 1914 (as amended), were preferred against the

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

defendant Pocock. The Court was invited by counsel for the Board of Trade, acting no doubt on instructions, to deal with the case summarily. It turned out that not only were there seven cases which were the subject of informations, but there were six other cases which, when the justices announced their decision to convict the defendant, he desired to be taken into consideration. There were, therefore, altogether thirteen cases. We have not heard very much about the nature of those cases, but I desire to say what has been said before in this Court, especially in the case of BODMIN JUSTICES; *Ex parte* MCEWEN [1947] K. B. 321, that the fact that justices can deal with cases is no reason why they necessarily should deal with them. When a case is of a serious character—and a case involving thirteen bankruptcy offences surely is a case of a serious character—that case ought to go for trial. It is not merely a matter of what the sentence may be. When the case does go for trial, the Court of trial may think it necessary only to impose a nominal sentence or even bind over. That is not the point. Serious cases ought to be dealt with by a superior Court, and if in this case the justices had been asked to send this case for trial in the first instance, there is no reason to suppose that they would not have done so and this trouble would never have arisen. They were, however, asked by counsel representing a Government Department, the Board of Trade, to whom the administration of the Bankruptcy Acts is entrusted, to deal with the case summarily, and it is therefore not surprising that they consented to do so.

When they heard that there were no fewer than thirteen charges against the defendant, they said, not unnaturally, " The sentence we can impose is inadequate ". Thereupon, no one taking any objection, they said " We are going to send this case forward under section 29 of the Criminal Justice Act, 1948, to quarter sessions to be dealt with ". Again the justices were not corrected in that view, and, being lay justices, I am certainly not going to make any strictures upon them or attach blame to them. It certainly was remarkable that their clerk did not point out to them that if they did send him forward

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

for sentence they must, under the terms of the section, send him forward in custody. In fact they admitted him to bail. That, again, was wrong.

When the case came before quarter sessions, counsel for the prosecution very properly pointed out that there was a complete misconception, and that there was no power to send the case forward for sentence to quarter sessions, because the case was one which arose under section 28 (1) and not under section 28 (2). Accordingly, quarter sessions perfectly properly said " We cannot deal with it ", and discharged the defendant's bail. Thereupon the question arose what should be done. In fact other summonses issued against the defendant in February of this year at the instance of the Director of Public Prosecutions stated that information had been laid by somebody from the Solicitor's Department of the Board of Trade charging him with certain offences. The statement of offence, to take one of them, was " contrary to section 154 (9) of the Bankruptcy Act, 1914, as amended ", and then followed the particulars of offence, which showed that it was exactly the same offence as had been before the justices on the previous occasion when they sent him to quarter sessions, as they thought, for sentence.

The summonses which were issued against the defendant stated " You are therefore hereby summoned to appear before the Court of Summary Jurisdiction . . . on Monday the 27th day of February, 1950 . . . to answer the said information, and be sentenced for the said offence in respect of which you were convicted by the said Court on the 5th day of December, 1949 ". On the return day of those summonses a solicitor appeared and apparently informed the Court that the defendant was physically present in the neighbourhood of the Court, but his solicitor took the objection that the justices had no power to hear the case because they had already heard it. He said that his client would not come into Court and that if he did come into Court he would plead *autrefois convict*, and also he told the justices that if they proceeded to deal with him they would render themselves

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

liable to civil proceedings for false imprisonment. One is not altogether surprised, therefore, that the justices said: "We will not do anything unless we are ordered so to do by the High Court", and the question now arises whether the justices could not lawfully on that day have sentenced the defendant.

The first point made by the Attorney-General is that the decision of the justices to send the defendant forward for sentence was a mere nullity, and that therefore these proceedings had never been concluded. Mr. Widgery, however, on behalf of the defendant, in the course of a very attractive argument, has submitted to the Court that the decision of the justices was a judgment and that, therefore, the justices, having convicted and having proceeded, as he says, to judgment, were *functi officio* and no further proceedings could be taken. He likened the case to a case which so often has happened where justices have imposed a penalty which they had no power to impose. If, for instance, a statute enables justices to impose a penalty of three months' imprisonment as a maximum and the justices by mistake impose a sentence of six months' imprisonment, it has always been held that the conviction is bad on its face, because it records a penalty for a crime which the crime does not carry, and this Court has always quashed the conviction in such a case. There was a recent case, WILLESDEN JUSTICES; *Ex parte* UTLEY, [1948] 1 K. B. 397, in which justices had imposed a fine of £15 and it turned out that the utmost penalty that they could impose was a penalty of £5, and this Court quashed the conviction when it was brought up on *certiorari*.

The first question is: Is this a judgment? In my opinion, it is not a judgment. In my opinion, the effect of section 29 of the Criminal Justice Act is that if justices for the reasons therein given have come to the conclusion that their powers are not sufficient, they may abstain from pronouncing judgment and send the case forward to quarter sessions to pass judgment. The case in fact is not disposed of; it has become, by virtue of this section, a sort of composite case in which power is given to one Court to convict and to another Court to

give judgment, and until the judgment is given, the hearing of the case is not complete. It is the judgment which is given by quarter sessions which finally determines the case. It seems to me that if we were to hold that the order by justices sending this case forward were a judgment, we should be going very near to holding that a committal for trial in an indictable case was a judgment. If in an indictable case a committal for trial is a final judgment, then when justices refuse to send a case for trial, that would equally be, as it seems to me, a judgment, whereas everybody knows that it is not. If justices sitting as examining justices taking depositions come to the conclusion that a *prima facie* case is not disclosed and discharge the defendant under the Indictable Offences Act, 1848, it is always open to the prosecution, if further evidence comes to their hand, to take subsequent proceedings and proceed with the case. There is certainly no authority, as far as this Court is aware, which lays down that a committal for trial is anything but a step in a proceeding. It has never been decided that it is a judgment, and I cannot see myself how it can be said that the sending forward of a case by justices in order that quarter sessions may pass judgment in lieu of the judgment which the justices might have passed—the words being, " in lieu of dealing with him in any manner in which the Court has power to deal with him "—is a judgment.

The Court has received assistance in this case from the old case of KENWORTHY (1823), 1 B. & C. 711. There the record of a trial for perjury at the Chester Summer Assizes recited that " It is therefore ordered that he the said Lawrence Kenworthy be transported ". It was brought up on error, and there was nothing in the record to show that it had been adjudged. Chief Justice Abbott (afterwards Lord Tenterden) in the course of the argument said (at p. 712): " Perhaps no judgment at all has been given; and if so, there cannot be any reversal ", because it was being argued in that case that judgment ought to be reversed. I observe that counsel in arguing said (at p. 712): " In Coke, 4 Inst. p. 70, there is this passage: ' This conclusion followeth, that the King hath

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

committed and distributed all his whole power of judicature to several Courts of justice, and therefore the judgment must be, *ideo consideratum est per curiam*' ''. There are other authorities which may be found which show that the test of judgment is whether, in the formal record of the Court, those words "*ideo consideratum est*" appear. It is for that reason that it has always been held that error did not lie to reverse the decision of a Court given on an application for one of the prerogative writs because, said the Court, there is no "*ideo consideratum est*" in the Order of the Court. (See DEAN AND CHAPTER OF DUBLIN (1724), 1 Strange 536; and PENDER *v.* HERLE (1725), 3 B. & C. 505.) In other words, it had never been adjudged.

In KENWORTHY'S CASE, the Chief Justice giving judgment said (at p. 713): "By the Act in question, two things are required to be done by the Court before which the party is tried: An order for transportation is to be made, and thereupon judgment is to be given. Now, here, the Court made an order not followed by a judgment. There is no doubt that, at common law, where the punishment is not discretionary, the record of an inferior Court may be removed into this Court, and we may pronounce judgment; but in this instance we cannot do so. Inasmuch, therefore, as no judgment has been entered below, and this Court has no power to supply the deficiency, the proper course appears to be for us now to order the Court below to proceed to give judgment on the conviction"—and a *procedendo* was awarded. That seems to me to show what is necessary in finding that there is judgment: it must be something which puts an end to the case. It must be a final adjudication, and there has been no final adjudication in this case. Therefore, in my opinion, the justices were not *functi officio*.

Then comes the question what ought to be done. The committal to quarter sessions for sentence was a nullity and therefore the case had never been finally determined. It seems to me, therefore, that the case was really in the same position as it would have been if the Court, instead of having ordered

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

the case to go to quarter sessions, had given no decision at all except that they convicted and had not proceeded to give a judgment or had adjourned the case to give judgment. The justices must, therefore, finish the case, and all that is necessary, as it seems to me, is that notice should be given to the prisoner that on such and such a day the Court will proceed further to hear the case. I think that notice can be given quite informally. In the present case, if the justices had not felt obliged—and I am far from blaming them—to wait and see what this Court would do and they had taken their courage in both hands and said that they would go on with the case on the return day of the summonses and if a policeman had gone outside and said to the defendant "Please step inside, and if you do not, I shall take you inside", no objection could have been taken by the defendant to anything as having been done illegally. It is true that each summons served on him required him to appear and "answer the information". I think it would have been better if those words had not been included; but it does not seem to me that it matters what the form of the notice was. The case had not been finished; it had got to be finished. Therefore, as soon as the prisoner was told that the case would be finished on a certain day and that he was to appear, if he did not appear, under the Summary Jurisdiction Acts, the Court could, I think, have sentenced him in his absence and then issued their warrant to have him conveyed to prison in accordance with the sentence. At any rate, they could have issued a warrant against him for not appearing, in the same way that if a summons is adjourned from time to time, either as part heard or because it has not been gone into, and the defendant does not appear, when the Court thinks it is desirable that he should appear because a sentence of imprisonment might follow, then in accordance with the Summary Jurisdiction Acts they can issue a warrant calling upon him to appear. I think, therefore, that on the day in question the justices not only had the power but had the duty to pass sentence upon the defendant in order that these proceedings might be brought to an end by a judgment of the

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

Court. As they did not do it, the proceedings were not brought to an end. Again I desire to say that no blame can be attached to the justices in this case. It is not a case in which justices were acting unreasonably or recalcitrantly. They wanted guidance in a position which had arisen largely because the professional representatives had not kept the justices straight upon this point, and certainly, difficult and novel questions had arisen owing to this change in the law.

In my opinion, therefore, *mandamus* should go directing the justices not to hear and determine, but "to impose a sentence upon the said Leonard Pocock in respect of the offences of which they have convicted him".

HUMPHREYS, J.: I entirely agree with the judgment which my Lord has pronounced. It is now admitted that the procedure of the justices on the first occasions when the matter was before them was an error and an error of such a character that it was a nullity. They had no more power to order the defendant to appear before quarter sessions on bail to receive sentence than they had power to order him to be executed. Their only power to order him to appear before quarter sessions is the power given by section 29 (1) of the Criminal Justice Act, 1948, which provides in terms the particular cases in which they may take that course; and this was not one of them. Therefore quarter sessions quite properly held that they had no power to deal with the matter at all.

The question which now arises is: Quarter sessions having said that, what was the power, if any, which the justices had of continuing the hearing? It is said, on the one hand, that they had no power at all because they had adjudicated, in that they had heard the informations and had convicted. The answer seems to me to be that a Court of summary jurisdiction does not complete the hearing of an information merely by convicting, because, without any judgment upon the matter one way or the other, that leaves in the air the most important part of a conviction, namely the sentence of the Court following upon that conviction. It seems to me that the duty of justices,

having issued summonses which were returnable before the Court as constituted on the particular day, was to hear and determine the informations, and not to leave the case until they had heard and determined them. They had not completed that hearing by merely convicting, because there was something else which they had to do; and, in my view, it is quite wrong to say that they had made a judgment in the matter.

I think the distinction between judgment and order, with which my Lord has dealt in his judgment, is conclusive as showing that here, although the justices had made an order which they had no power to make but which they thought they had power to make, they did not attempt to give any judgment at all upon the finding of guilt which they had recorded. That being so, when the matter came back to them, their duty was to continue and complete the adjudication upon the informations.

The question has been argued—what is to happen if the person who has been convicted in such a case does not come before the Court? The course taken in this case was to serve what were thought to be further summonses upon him. The word "summons" has received a technical meaning as it is used in the Summary Jurisdiction Acts, and I certainly think (and I believe my Lord is of the same opinion) that it would have been better that the word "summons" should have been omitted altogether so as to make it clear that the justices were not purporting to issue fresh summonses in regard to these matters. They were merely telling a man in regard to whose case it now appeared that no finality had been arrived at, so that the case was, therefore, *sub judice*, that he must attend the Court in order that he might be heard and in order that the Court, having heard him, might finally adjudicate upon that matter. I think that a simple notice telling him to appear and attend the Court was all that was required, and that the notice should have told him that upon that day the justices would proceed to hear him and consider the appropriate sentence to be passed. In point of fact, the defendant attended in person with his solicitor as far as the door of the Court, but did not go inside it

1950.
May 3.

R. *v.* NORFOLK JUSTICES; *Ex p.* D.P.P.

Goddard, L.C.J., Humphreys, J., Byrne, J., Morris, J., Finnemore, J.

and I have no doubt that if the justices had said " We will now go on with this case and do what quarter sessions have said we ought to do, that is ourselves pass sentence ", his solicitor would have called him in. That was, I imagine, why the solicitor had brought him there. But the justices said, " We have no power to deal with him ", whereupon the solicitor, no doubt, told his client to go away, as he was perfectly entitled to do. I do not think that the solicitor acted in any way wrongly in not producing his client on that occasion. If the defendant after the service upon him and the justices of the Order of this Court which my Lord has proposed, and with which I agree, should be unwise enough to pay no attention to that notice to attend next time, I have no doubt whatever that there is ample power both in this Court and in the justices to compel him. The justices would then be in the position that they had been ordered by this Court to hear a matter which necessitates the appearance of the accused person, or, at all events, makes very desirable the attendance of the accused person, and if the accused person does not attend, I have no doubt whatever that there is ample power in that bench of justices to bring him there and bring him there with the assistance of a policeman if necessary. But that position has not arisen because I do not suppose he would be foolish enough to refuse to attend upon the justices when he gets the notice which I assume he will get. I agree that the *mandamus* should go in the form which my Lord has proposed.

BYRNE, J.: I agree, and I have nothing to add.

MORRIS, J.: I also agree.

FINNEMORE, J.: I agree.

Order for mandamus.

Solicitors: Director of Public Prosecutions, for the applicant; Treasury Solicitor, for the justices; Metcalfe, Copeman & Pettefar, for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE PARKER.

JAMES HENRY HUNT.
SIDNEY BUXTON BADSEY.

1950.
May 15.

Gross Indecency Between Males—No Physical Contact—Grossly Indecent Exhibition by Two Men—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 11.

In order to constitute the offence of gross indecency between male persons, actual physical contact is not essential, and it is sufficient if the persons charged have placed themselves in such a position that a grossly indecent exhibition is going on between them.

Dicta in HORNBY & PEAPLE (1946), 32 Cr. App. R. 1, at p. 3, followed.

Appeals against conviction and sentence.

The appellants were convicted at Wiltshire Quarter Sessions on March 29, 1950, of committing an act of gross indecency with each other, and were each sentenced by the Deputy-Chairman to twelve months' imprisonment.

The appellants were found by the police in a shed late at night making grossly indecent exhibitions to each other, though there was no actual physical contact between them. In answer to questions by the jury, who desired further assistance after they had retired to consider their verdict, the Deputy-Chairman directed them that actual physical contact between the persons charged was not necessary to constitute the offence.

G. H. Rountree, for the appellants:

The direction given by the Deputy-Chairman was inadequate in that he did not indicate to the jury what kinds of act can be held to constitute an act of gross indecency. It cannot, however, be contended that the Deputy-Chairman's direction

1950.
May 15.

JAMES HENRY HUNT.
SIDNEY BUXTON BADSEY.

Goddard, L.C.J., Humphreys, J., Parker, J.

that proof of actual physical contact was unnecessary was wrong. The sentences, in all the circumstances, were too severe.

D. Ackner, for the Crown:

The *obiter dictum* in HORNBY AND PEAPLE (1946), 32 Cr. App. R. 1, at p. 3, that actual physical contact is unnecessary correctly states the law. All that the prosecution are obliged to prove is concerted action to behave in a manner which is grossly indecent.

THE LORD CHIEF JUSTICE: I do not propose to go through the disgusting evidence in this case. The movements of the appellants, who are two grown men, had caused some suspicion and they were watched by the police. They were found in a shed in positions in which they were making filthy exhibitions the one to the other.

The only point which arises on the appeal is this. The jury, having heard the evidence of the prosecution and the very feeble explanation which the appellants gave, came back, after they had retired to consider their verdict, to ask a question. Obviously they wanted further assistance from the Court, and what they said was: " We think the intention was there, but that no actual offence was being committed ". Asked to repeat that, the foreman said: " We think that no actual offence was committed; that you have proved nothing, but the intention was there. We cannot agree on the point as to whether they are guilty or not ". That obviously means: " We have heard the evidence. We think these men had filthy intentions, but we want further instruction whether we should return a verdict of guilty or not, because on that we are not agreed ". Then a discussion took place, and the learned Deputy-Chairman perfectly properly asked some questions to find out exactly what the jury wanted to know. It became perfectly clear that what the jury wanted to know was whether, in order to constitute the offence of committing an act of gross indecency between male persons, it was necessary for the

1950.
May 15.

JAMES HENRY HUNT. SIDNEY BUXTON BADSEY.

Goddard, L.C.J., Humphreys, J., Parker, J.

prosecution to satisfy the jury that there had been some actual physical contact between the men—some touching of the private parts with the hand or something of the sort. Counsel for the appellants said that he could not argue that physical contact was necessary and it is quite clear that physical contact may not be necessary. If two men put themselves in such a position that it can be said that a grossly indecent exhibition is going on, they can be found guilty of committing an act of gross indecency.

The Deputy-Chairman put the matter in this way: "I do not know whether you mean that you are quite satisfied that no contact had taken place. Do you mean that? You are satisfied, I gather you say, that there was the intention there? (The foreman of the jury) Yes. (The Deputy-Chairman) But you are not satisfied that any actual act, any contact had taken place? (The foreman of the jury) That is right". Then the Deputy-Chairman told them that it was not necessary that there should be actual contact, but that they had to decide whether or not there was an act of gross indecency, and that an act of gross indecency could be supported on the evidence that the two men were making a grossly indecent exhibition. In those circumstances, we cannot say that there was anything wrong in what took place. The jury had not returned a verdict. If they had, they could not have been cross-examined on their reasons for the verdict; but they had not returned a verdict; they said that they were not agreed and that they wanted further direction. Further direction was given to them and we cannot say that it was otherwise than accurate. Therefore the verdict must stand.

With regard to the sentences, the position is different. The offence was committed between two grown men, who, no doubt, are thoroughly ashamed of themselves and one of whom has suffered a penalty in the loss of his occupation. The Deputy-Chairman has reported that the Bench took a very serious view of the case, but, in the opinion of the Court, the sentences were not sentences which the offence justified, because there was in it no element of corruption and the place

1950. *May* 15.

JAMES HENRY HUNT. SIDNEY BUXTON BADSEY.

Goddard, L.C.J., Humphreys, J., Parker, J.

where the act was committed was not a public urinal, but a shed, the time being late at night. The Court thinks that justice will be done if we reduce the sentence in each case to one of three months' imprisonment, to run from the date of conviction.

Convictions affirmed.
Sentences reduced.

Solicitors: Taylor, Wilcocks & Co., agents for Kinneir & Co., Swindon; Townsends, Swindon, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS, MR. JUSTICE STABLE, MR. JUSTICE CASSELS, MR. JUSTICE HALLETT, MR. JUSTICE MORRIS AND MR. JUSTICE PARKER.

1950. *May* 22.

JOHN WILLIAM TAYLOR

Bigamy—Seven Years' Absence—Defence Available to "Person Marrying a Second Time"—Extent of Availability of Defence—Offences Against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

Section 57 of the Offences Against the Person Act, 1861, provides: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony . . .: provided that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time . . .".

The words "a second time" in the proviso are not limited to a second ceremony of marriage in point of time, and the defence of seven years' absence is open to a defendant on any

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

charge of bigamy preferred in an indictment, as the bigamous marriage charged is, for the purposes of the section, the "second marriage" referred to therein.

TREANOR (1939), 27 Cr. App. R. 35, not followed.

Observations on the power of the Court to dissent from its own previous decisions.

Appeal against conviction.

The appellant pleaded Guilty at the Central Criminal Court on March 23, 1950, to two charges of bigamy and was sentenced by the Recorder to four years' imprisonment.

The appellant married his lawful wife in 1925. In April, 1927, he went through a form of marriage with another woman. In November, 1942, he went through another form of marriage with a third woman. In November, 1944, he was charged at Kent Assizes in respect of the ceremony of November, 1942, it being alleged in the indictment that the lawful wife was the woman with whom he went through the ceremony of marriage in April, 1927. The mistake being ascertained, the appellant was found Not Guilty. In June, 1945, he was indicted at the Central Criminal Court in respect of the ceremony of April, 1927, but as the prosecution were then unable to prove that the lawful wife was still alive in April, 1927, he was found Not Guilty. On December 18, 1946, he went through another ceremony of marriage, and on December 24, 1948, yet another. These two last ceremonies of marriage—the third and fourth bigamous ceremonies in point of time—were charged in the two counts of the indictment to which the appellant pleaded Guilty on March 23, 1950. The prosecution were unable to prove that the appellant knew his lawful wife to be alive at any time after 1927, but defending counsel took the view that, by reason of the decision in TREANOR (1939), 27 Cr. App. R. 35, as the bigamous ceremonies charged were the third and fourth in point of time, the defence of seven years' absence was not available to the appellant, and advised him to plead guilty. The appellant applied for leave to appeal against sentence, but when the Court saw the papers in the case, they took the view that the decision in TREANOR (*supra*) required

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

further consideration, and accordingly gave the appellant leave to appeal against conviction.

Michael Havers, for the appellant:

Bigamy was first made triable by the King's Courts in 1604 under the statute 2 Jac. 1, c. 11. The defence of seven years' absence is given by the proviso to that statute, and although the proviso does not use the phrase "second marriage", the body of the section clearly contemplates one or more subsequent marriages. The next statute, the Offences against the Person Act, 1828 (rep.) is in substantially the same terms as the present statute. In section 57 of the present statute, "second" in the main part of the section and in the first part of the proviso must mean "second or subsequent" and it is submitted that "second marriage" must have the same meaning throughout the section. It is submitted, therefore, that TREANOR (1939), 27 Cr. App. R. 35, where the contrary was held, was wrongly decided.

Henry Elam, for the Crown:

It is ceded that the prosecution could not have proved that the appellant knew his wife to be alive at any time during the seven years preceding either of the offences charged, and that if the defence under the proviso was open to him, he should have been acquitted on both charges. The whole question therefore, is whether TREANOR (*supra*) was rightly decided. The policy of the Legislature is in certain cases to allow a statutory defence to apply once and once only, as under section 1 of the Criminal Law Amendment Act, 1922. [The Lord Chief Justice: When trying any particular count for bigamy, the Court can never be concerned with more than two marriages. It is the second marriage being dealt with by the Court trying the particular count that constitutes the offence.]

THE LORD CHIEF JUSTICE: The appellant was charged and pleaded Guilty at the Central Criminal Court last March before the learned Recorder to an indictment containing two counts.

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

In the first count he was charged that on December 18, 1946, he married Lilian Smithers during the lifetime of his wife Alice Julie Taylor, and in the second count it was alleged that on December 24, 1948, he married Olive Briggs during the lifetime of his wife.

The circumstances of the case were these. The appellant was lawfully married to his wife, who is still alive, in the year 1925. In April, 1927, he went through a form of marriage with another woman. In November, 1942, having left that second woman, he went through another form of marriage. In respect of that ceremony he was charged at Maidstone Assizes in November, 1944, with bigamy, but it was alleged in the indictment that he had committed bigamy during the lifetime of the woman with whom he had gone through the first bigamous ceremony, who it was then believed by the prosecution was his lawful wife. On it being shown that she was not his lawful wife, the verdict had to be one of Not Guilty. He was then charged at the Central Criminal Court in the following year in respect of the first bigamy, namely, the bigamy he had committed in April, 1927, but that charge failed because no evidence was given by the prosecution that at the time when he went through the second ceremony of marriage in 1927 his lawful wife was alive; in other words, the lawful wife could not be traced. He was, however, convicted on a count in the indictment charging him with making a false declaration for the purpose of the marriage register, and for that offence he was bound over.

His habit, however, of going through ceremonies of marriage appeared to continue, because he went through another ceremony of marriage in 1946 and a fourth ceremony in 1948. It was in respect of those two ceremonies that he was charged at the Central Criminal Court last March and pleaded Guilty. He applied for leave to appeal against his sentence, and he would not have got leave to appeal if he had been properly convicted, for a more persistent bigamist it is hardly possible to imagine. The appellant is an obvious danger to women, a scoundrel, and has no merits at all.

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

When this Court last Monday saw the papers in the case with a view to considering whether leave to appeal against sentence should be given, it at once appeared that at the time when he went through the bigamous ceremonies in December, 1946, and December, 1948, he had not seen his lawful wife for very many years. The wife had said that the last time when she saw him was in 1925, and it was either in 1925 or 1927 that the spouses had last seen each other. The various women, of course, with whom he had gone through ceremonies of marriage were not thereby afforded the status of wives. We therefore inquired how it was that the prisoner pleaded Guilty, and Mr. Havers, who had appeared for him at the trial, told us that he felt unable to advise him to take any other course because of the decision of this Court in TREANOR (1939), 27 Cr. App. R. 35, in which case, in somewhat similar circumstances, the Court had held that where more than one bigamous ceremony was shown, the prisoner was deprived of the defence that his wife had been continually absent for seven years then last past and had not been known by him to be living within that time. That case seemed to the Court to need further consideration. Accordingly, we gave leave to the appellant to appeal against his conviction in order that a full Court might assemble to consider the decision in that case.

I should just like to say one word about the reconsideration of a case by this Court. A Court of Appeal usually considers itself bound by its own decisions or by decisions of a Court of co-ordinate jurisdiction. For instance, the Court of Appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords also always considers itself bound by its own decisions. In civil matters, it is essential, in order to preserve the rule of *stare decisis*, that that should be so; but this Court has to deal with the liberty of the subject, and if this Court found on reconsideration that, in the opinion of a full Court assembled for that purpose, the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

reconsider the earlier case with a view to determining whether he had been properly convicted. The exceptions which apply in civil cases ought not to be applied in this case, and in this case the full Court of seven Judges is unanimously of opinion that the case of TREANOR (*supra*) was wrongly decided, for a reason which I will indicate in a moment.

The offence of bigamy, so far as it is a temporal offence, was created in the first place by the statute 2 Jac. 1, c. 11, which the industry of Mr. Havers has discovered for us. It is there provided: "If any person or persons within His Majesty's Dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the end of the session of this present Parliament, marry any person or persons, the former husband or wife being alive; that then every such offence shall be felony". It is perfectly clear from that first section which I have read that what is aimed at there is what I may call polygamy and not merely bigamy, not merely a second marriage, but any number of marriages, because the words are "shall marry any person or persons". Then there is a proviso: "Provided always that this Act nor any thing therein contained shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within His Majesty's Dominions, the one of them not knowing the other to be living within that time".

It is perfectly clear that under that statute the defence of absence for seven years without knowledge of the spouse being alive was a defence, however many times the ceremony of marriage had been gone through. I need not take up time by reading the next statute, the Offences against the Person Act, 1828, because the section in the Offences against the Person Act with which we are immediately concerned, that is to say, section 57 of the Offences against the Person Act, 1861, is in substance in the same form. The section provides: "Whosoever, being married, shall marry any other person during the

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere, shall be guilty of felony. . . : provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage ".

It is quite obvious that one has to give to the words " second marriage " at the beginning of the section the same construction as one must give to the words " second marriage " where they appear the second time later on and also to the words " marrying a second time ". It is clear that if the words " second marriage " in the first part of the section, the enacting part, which makes it a felony, were to be limited to the second ceremony and were not to include a third and subsequent ceremonies, a person could be convicted only if he had married twice and not if he had gone through a third, fourth or fifth subsequent ceremony. But TREANOR (*supra*) put a construction on the words " marrying a second time " from which this Court sees no reason to differ from one point of view, though in our opinion the Court did not go on and give the logical effect to their decision. It was held by the Court (at p. 37): " the proviso means precisely what it says—neither more nor less—and when the expression ' marrying a second time ' is used, it means a ' second time ' ". Then the Court went on to say that it is not to be artificially expanded into meaning a " second or subsequent time ".

The short point upon which this Court can decide this case, and which seems to me to be the true way of deciding it, is this: When a Court is dealing with a count charging bigamy, it is dealing with the allegation that on a particular day a man went through a ceremony of marriage when his lawful wife

1950.
May 22.

JOHN WILLIAM TAYLOR.

Goddard, L.C.J., Humphreys, J., Stable, J., Cassels, J., Hallett, J., Morris, J., Parker, J.

was alive, and the Court therefore is dealing only with two ceremonies of marriage and not more, the lawful marriage and the bigamous or polygamous marriage, which is the second marriage. Directly the bigamous or polygamous marriage is proved, it is open to the defendant to show that at the time of that ceremony of marriage—which is the only ceremony of marriage with which the Court is concerned—his wife had been absent for seven years last past. It does not seem to this Court that it is open to the prosecution to say: "There have been other ceremonies of marriage in between". The offence which is charged is the offence of going through a particular form of marriage on a particular day when the lawful wife was alive. Therefore, the defendant has a defence if it is shown that at the time he went through the form of marriage which is charged against him as a felony, he had not seen his wife for seven years. Any other construction would lead to very astonishing results. It cannot be said, if a man went through a form of marriage with a woman when he had not seen his wife for seven years (and when, therefore, he would have a perfectly good defence) and lived with that woman, and then she died and he went through another form of marriage, still never having known that his lawful wife was alive but knowing that the second woman was dead, that he would be guilty of an offence. It is enough to say that whilst we do not differ from the opinion which the Court in TREANOR (*supra*) expressed that "marrying a second time" must be strictly construed, the second marriage which has to be considered is the second marriage charged in the indictment and no other. Therefore, for those reasons, although we do not differ from the construction put on the section in TREANOR (*supra*) we do differ from the result which the Court held followed from that construction.

Accordingly, we hold that though the appellant might have been properly charged with other offences, he could not be convicted of the offence of bigamy and therefore these convictions must be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE PARKER.

1950.
May 23.

HERBERT COLLINS.

Fresh Evidence—Reference by Home Secretary—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 4 (1), 19 (*a*) (*as amended by the Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 79 *and Sched. IX*).

Observations on the circumstances in which the Court will hear fresh evidence.

Where fresh evidence is heard, the Court, in deciding whether the conviction should be affected by it, will adopt the same principle as is followed on the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and will dismiss the appeal if satisfied, after considering the effect of the fresh evidence, "that no reasonable jury properly directed throughout would, or could, have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred".

HADDY, 29 Cr. App. R. 182, at p. 191; [1944] K. B. 442, at p. 446, applied.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907 (as amended).

The appellant was convicted at West Kent Quarter Sessions on July 20, 1949, of garage-breaking and larceny, and was sentenced by the Chairman to three years' corrective training. He applied to the Court of Criminal Appeal for leave to appeal against conviction, and for leave to call fresh evidence. On November 1, 1949, the Court refused both applications. The appellant petitioned the Home Secretary for the exercise of the prerogative of mercy. The Home Secretary referred the case to the Court under section 19 (*a*) of the Criminal Appeal Act, 1907 (as amended), and sent to the Court statements of witnesses not called at the trial which had been taken by the police.

At the trial the appellant put forward the defence of an

1950.
May 23.

HERBERT COLLINS.

Goddard, L.C.J., Humphreys, J., Parker, J.

alibi, which the jury rejected. The Court, on the hearing on May 23, 1950, allowed the appellant to call fresh evidence, and heard two witnesses not called at the trial, namely, a woman of loose character, who said that the appellant was in her company on the night of the commission of the crime, and the appellant's mother, who gave evidence of the time of the appellant's arrival at her house and the clothes which he was wearing at the time.

John Gower, for the appellant.
K. G. Jupp, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted before West Kent Quarter Sessions on having between July 1 and July 4, 1949, broken into a garage at Sittingbourne and stolen certain property therein. His defence was an *alibi*, which was rejected by the jury. He applied to this Court for leave to appeal and for leave to call fresh evidence. When the applications came on, no ground was shown for the application to call fresh evidence; the case did not come anywhere near the class of case in which the Court allows fresh evidence to be called, and the applications were refused.

The matter now comes before the Court under section 19 (*a*) of the Criminal Appeal Act, 1907 (as amended). Under that section, if a convicted person has petitioned the Home Secretary for the exercise of His Majesty's mercy, the Home Secretary can refer the case to the Court and then the Court has to deal with it as an appeal. The Home Secretary, in referring the case to the Court, sent with it certain statements of witnesses which had been taken by the police, and the Court was invited to hear fresh evidence on the ground that there had been a misunderstanding which prevented those witnesses from being at the trial.

Mr. Gower, who has conducted the case for the appellant with admirable frankness, has told us that, being instructed at the last moment under the Poor Prisoners' Defence Act, 1930, without the assistance of a solicitor, he saw the prisoner

1950.
May 23.

HERBERT COLLINS.

Goddard, L.C.J., Humphreys, J., Parker, J.

at the trial, which of course he was entitled to do, and saw the witnesses whom it was inevitable he should see, being instructed in that way. Having come to the conclusion that at least two witnesses would be of importance, he told them to attend on a certain date, a Wednesday, when he thought the case was likely to come on, unless he sent them a telegram. He is practically certain that his recollection is right that he did telephone a telegram to the witnesses from a telephone box, and we are willing to approach this case on the footing that there was either some misdelivery of the telegram or failure to deliver it, though it would have been much more satisfactory if we had had some information from the Post Office whether a telegram had been received or delivered. But it is not merely because there may be some misunderstanding about the attendance of a witness that this Court will allow fresh evidence to be called after a conviction, especially where, as in this case, it was known that the witnesses were not present when the case, on the advice of counsel, went forward. Counsel has told us that as the evidence which he proposed to call was the evidence of a married woman who had apparently been leading an immoral life and had been described by the appellant as a prostitute, the witness might refrain from coming or be unwilling to come to the trial to give evidence. Therefore he thought that he was not justified in asking for an adjournment. As a general rule, in those circumstances this Court would certainly not have allowed further evidence to be called.

The danger of allowing further evidence to be called after conviction, and the reason why the Court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: "If this evidence had been given at the trial, it does not follow that the jury would have convicted, or they might not have convicted". That is especially true in cases where the defence is an *alibi*. Two or three witnesses perhaps are called to establish an *alibi*, which the jury reject.

1950.
May 23.

HERBERT COLLINS.

Goddard, L.C.J., Humphreys, J., Parker, J.

It is very often not difficult after conviction to find another witness or perhaps two more witnesses who would be willing to come and support the *alibi*, and it can always be said: "If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility". That is one of the reasons why this Court is necessarily reluctant to allow further evidence to be called after conviction.

We allowed the evidence to be called in this case because the reference had been made to the Court by the Home Secretary, who wanted the Court to deal with it. The Home Secretary had sent forward the evidence which had been placed before him, and it therefore seemed right to the Court in those circumstances to depart from the rule which it otherwise would have applied, and to hear the evidence and consider it together with the other evidence in the case. [His Lordship referred in detail to the evidence in the case, and to the further evidence, and continued:] Having heard the whole of this further evidence, we find it singularly unsatisfactory, and we think that in this matter we should apply the same test as has been laid down in considering whether the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied. The test which was laid down in this Court in HADDY, 29 Cr. App. R. 182, at p. 191; [1944] K. B. 442, at p. 446, in considering whether the proviso should be applied—and we see no difference in principle between that question and the question of further evidence—is whether we are satisfied "that no reasonable jury properly directed throughout would, or could, have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred". Having given this case its best consideration, this Court is quite satisfied that no miscarriage of justice has occurred and therefore we dismiss the appeal.

Appeal dismissed.

Solicitor: E. W. G. Weale, Maidstone, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE FINNEMORE.

1950.
June 6.

JOHNSON KIRKUP.

Serving Soldier—Offence Relating to Government Property—Duty of Police.

Where an offence is committed by a serving soldier in relation to Government property at the place where he is stationed, the proper person to deal with the matter is his commanding officer, so that the offence may be adjudicated upon under military law, and it is unnecessary for the civilian police to interfere.

Appeal against sentence.

The appellant, a serving soldier, was convicted on February 21, 1950, at a court of summary jurisdiction for the Salisbury and Amesbury Petty Sessional Division of larceny of Government property, and was committed, under section 29 (1) of the Criminal Justice Act, 1948, to Wiltshire Quarter Sessions for sentence, and was there sentenced on March 15, 1950, to two years' imprisonment.

No counsel appeared for the appellant.

C. E. Blake, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was charged with stealing Government property. He was a serving soldier at the time of the offence and the property stolen was on the camp where he was stationed. At the time, the civil police were making inquiries into some other case with which the appellant was suspected of being concerned, and which it would be proper for them to deal with as it did not relate to Army property. They obtained permission from the military authorities to search the appellant's room at the camp, and they

1950.
June 6.

JOHNSON KIRKUP.

Goddard, L.C.J., Humphreys, J., Finnemore, J.

there found some Government property. When the appellant was accused in respect of that property he wrote out a full confession in his own handwriting. All that it was then necessary for the police to have done was to report the matter to the appellant's commanding officer, and he would then have been dealt with under military law, but apparently a police officer took it upon himself to tell the officer in charge of the camp that he must not do anything yet, because the police were going to make further inquiries.

It has been said by this Court and also at assizes that, where an offence has been committed by a serving soldier in relation to Government property at the barracks or camp or other place where he is stationed, the proper person to deal with the matter is his commanding officer so that the offence may be dealt with under military law, and that it is unnecessary for the civilian police to interfere.

The police were making inquiries into a case involving other property, with which the appellant was thought to be concerned, and in the meantime the appellant's commanding officer was told not to deal with the case relating to the Government property. The appellant was demobilised in October and no proceedings were taken against him by the police until December. He was arrested in January last and was convicted before a court of summary jurisdiction. As he had a criminal record, he was sent to quarter sessions for sentence. Owing to some unfortunate mistake the papers in the case were lost, with the result that further delay took place. In the circumstances the Court reduces the sentence of two years' imprisonment to a sentence which will allow the appellant to be discharged today. The Court hopes that this state of affairs will not occur again.

Sentence reduced.

Solicitors: Hodding, Jackson & Co., Salisbury, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE FINNEMORE.

1950.
June 6.

LEONARD GEORGE ION.

Jury—Retirement to Consider Verdict—Communication to Judge—Ambiguous Finding—Communication not Read in Open Court—Further Direction by Judge on Law—Conviction Quashed.

A prisoner, who was charged with housebreaking and larceny, did not dispute that he had broken into the premises in question, but contended that he had no intention to steal. After the jury had retired to consider their verdict, they sent a communication to the Recorder in the following terms: "We are all agreed that the accused broke into the premises, but we do not agree that it was his intention to steal". The Recorder did not read out the note in open court, and the prisoner and his counsel were unaware of its contents. The Recorder gave the jury a further general direction on intention, and eventually the jury convicted the prisoner.

Held, that when a communication to the Judge from a jury after they have retired to consider their verdict relates to a matter which cannot affect the merits of the case, it is within the discretion of the Judge whether it shall be read in open court in the presence of the prisoner and his counsel; but if such a communication relates to a matter in dispute which may result in the prisoner being either convicted or acquitted, the prisoner and his counsel must be informed of the contents of the communication; that in the present case it was essential for the proper doing of justice that they should have been so informed; and that the conviction must, therefore, be quashed.

Appeal against conviction (on certificate).

The appellant was convicted at Leicester City Quarter Sessions on March 31, 1950, of housebreaking and larceny and was sentenced by the Acting Recorder to nine months' imprisonment.

The appellant did not dispute that he had broken into the

1950.
June 6.

LEONARD GEORGE ION.

Goddard, L.C.J., Humphreys, J., Finnemore, J.

premises in question, but contended that he had no intention of stealing. After the jury had retired to consider their verdict, they sent a communication to the Acting Recorder in the following terms: "We are all agreed that the accused broke into the premises, but we do not agree that it was his intention to steal". The Recorder did not read out the communication in open court, and the prisoner and his counsel were unaware of its contents. The Recorder, in the presence of the prisoner and his counsel, gave the jury a further general direction on intention.

Yetta Frazer, for the applicant:

There was a grave irregularity in procedure in that the communication from the jury was never disclosed to the appellant or his counsel. The communication related to a vital matter. On one construction of it it was a plain verdict of Not Guilty, and on another it related to the fact that some of the jury were feeling difficulty about an essential ingredient in the offence. It was entirely different from the communication from the jury to the Judge in FURLONG AND OTHERS (*ante*, p. 79). [She was stopped.]

J. A. Grieves, for the Crown:

It is certainly most unfortunate that the Acting Recorder did not read out in open court the communication from the jury. The most reasonable construction of it, however, is that some of the jury were experiencing difficulty on the question of intent, and in those circumstances it was right and proper that the Acting Recorder should give them a further direction on a matter of law. That further direction was, of course, given in open court and from it the appellant's counsel would have gathered the nature of the jury's communication to the Acting Recorder.

HUMPHREYS, J.: The appellant was convicted at Leicester City Quarter Sessions of housebreaking and larceny, and he appeals against that conviction. There are several grounds of

1950.
June 6.

LEONARD GEORGE ION.

Goddard, L.C.J., Humphreys, J., Finnemore, J.

appeal, but the substantial one is that there was a serious irregularity in the conduct of the trial in that the Acting Recorder failed to read in open court a written communication which he had received from the jury. In the opinion of this Court, there is nothing in that point, standing by itself. It is not every note sent to the presiding Judge by the jury from their room while they are considering their verdict which must be read out in open court. Members of the jury might like to have a drink of water, and send in a note to say: "May we have a glass of water?" It would not be necessary to bring the prisoner from the cells and counsel from his room to hear the Judge say that they may have a glass of water. Similarly, there are other communications which quite obviously cannot affect the merits of the case in which it is left to the discretion of the presiding Judge whether the prisoner and his counsel (if he has one) ought to be brought into court so that they may hear what the jury have asked the Judge. Wherever, however, there is a matter in dispute which may possibly result in the prisoner being either convicted or acquitted and that appears in a written note sent in by the jury, it is obviously right and proper that the prisoner himself and his counsel should know what the jury have said to the Judge. It must not be assumed that this Court says that in every case counsel for the defence has a right to address the Judge on the jury's communication, because that might open the door to persistent counsel, when addressing the Judge, in effect saying to the jury all that he had already said to them when he was addressing them. That, again, must be left to the discretion of the Judge.

The point in the present case is this. The appellant undoubtedly was found in another person's premises and there was plenty of evidence that he had broken into them. His answer was that he did get into the premises, but that he had not the least intention of stealing anything. There was evidence—whether strong or weak is no matter—that that might possibly be the truth. The jury retired to consider their verdict, having been directed that they must be satisfied that

1950.
June 6.

LEONARD GEORGE ION.

Goddard, L.C.J., Humphreys, J., Finnemore, J.

the prisoner did break into the premises, about which there was really no dispute, and that he intended to steal when he did so. Later the jury sent a note to the Acting Recorder in these unfortunately ambiguous terms: "We are all agreed that the accused broke into the premises, but we do not agree that it was his intention to steal". That obviously might mean: "We are not satisfied that there was the intention to steal", in which case the prisoner was entitled to an immediate verdict of Not Guilty, or it might mean: "While we are satisfied that he broke into the premises, we are not all of one mind on the question whether it was his intention to steal". The obvious duty of the presiding Judge was to give them some direction, if necessary repeating the direction which he had already given, to this effect: "You must be satisfied that it was his intention to steal or else you must acquit him". If he felt it to be necessary, he might have reminded them of the evidence which went to show whether the prisoner did or did not intend to steal.

Unfortunately, the learned Acting Recorder did neither of these things. The appellant, we are told, was in court, and I think probably his counsel was also, but neither had any idea of the contents of the note which had been sent by the jury to the Acting Recorder, and of course the appellant was not allowed to say anything. The Acting Recorder said to the jury: "I have gathered that you are in a difficulty about intention in this case", and he then went on to say that a man's intention could be judged only by what he did, and he gave them a sort of general direction on intention. In our view, it was essential for the proper doing of justice that at that time counsel should have been told what the jury had written, and that the prisoner also should hear it. The matter becomes most unsatisfactory where one finds that there was a long direction to the jury on the matter, and eventually the jury came back and said: "We find him Guilty".

It is not necessary for this Court to decide what [illegible] proper interpretation of the ambiguous finding of the jury

1950.
June 6.

LEONARD GEORGE ION.

Goddard, L.C.J., Humphreys, J., Finnemore, J.

The Acting Recorder should either have interpreted it as meaning: " We are not agreed that he was a person who was intending to steal ", in other words, as a verdict of Not Guilty, or else he should have told the jury, if he thought that it was a matter on which they were in doubt, that they must not remain doubtful, but must decide definitely whether they were satisfied that there was the intention to steal or not. He did not do either of these things, and the position is so unsatisfactory that this Court has come to the conclusion that it has no alternative to quashing the conviction and discharging the appellant.

Conviction quashed.

Solicitors: Harding & Barnett, Leicester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE PARKER.

1950.
June 19.

WILLIAM HENRY SEDGWICK.

Sentence—Preventive Detention—Appropriate Minimum—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

Except in the case of an old man whom a Court might wish should not spend his last days in prison, five years is not an appropriate period for a sentence of preventive detention. In any other case seven years should be regarded as an irreducible minimum, and such a sentence should generally be for eight years or even longer. If a Court is of opinion that the longest time for which the prisoner ought to be deprived of his liberty is five years (subject to the usual remission) the proper course is to pass a sentence of five years' imprisonment.

BARRETT (1949), 34 Cr. App. 3, approved.

1950.
June 19.

WILLIAM HENRY SEDGWICK.

Goddard, L.C.J., Humphreys, J., Parker, J.

Appeal against sentence.

The appellant was convicted at Bradford Quarter Sessions on April 14, 1950, of office-breaking and larceny and was sentenced by the Recorder to five years' preventive detention.

No counsel appeared.

THE LORD CHIEF JUSTICE: The appellant was convicted at the City of Bradford Quarter Sessions of office-breaking and larceny and was sentenced to five years' preventive detention.

The Court gave leave to appeal because, in their opinion, the case is not one for a sentence of five years' preventive detention. We have done our best on more than one occasion to call the attention of Courts of Quarter Sessions to the fact that except in the case of an old man whom one does not wish should spend the last days of his life in prison, five years' preventive detention is not a sentence which should be given. We laid that down in BARRETT'S CASE, (1949) 34 Cr. App. R. 3, and the time has really come when Recorders and Chairmen of Quarter Sessions should read these reports and pay attention to what this Court has said. If preventive detention is justified in a case, it is justified because the Court is of opinion that the public have to be protected against the depredations of a particular prisoner for a long period of time. Five years, which means, if the convicted person behaves himself in prison, three years and four months, is not an appropriate period of preventive detention in the case I have just mentioned. If the Court thinks it is a case in which it should order preventive detention, we have said before now that seven years at least is the irreducible minimum, and it should be generally eight years or even longer.

We have called the attention of Courts to the fact that when preventive detention was first brought into force, as it was by the old Prevention of Crime Act, 1908, a Court had to pass a sentence of not less than eight years, because it had first of all to pass a sentence of penal servitude, which could not be for less than three years, and that, the statute provided, was to be followed by not less than five years' preventive

1950.
June 19.

WILLIAM HENRY SEDGWICK.

Goddard, L.C.J., Humphreys, J., Parker, J.

detention, making it eight years in all. Now, a sentence of imprisonment has not to be passed before a sentence of preventive detention. Special places have to be set aside for prisoners undergoing preventive detention, and if Courts continue to give five years' preventive detention it simply means that the Prison Commissioners will be put into difficulties, because the places set aside for preventive detention will be filled by persons who are put there for that short period instead of the longer period which Parliament evidently desired. The minimum of five years no doubt is very useful if an old man, as some of these habitual criminals are, is brought before the Court, and the Court would not like him to spend his last years in prison. Therefore, a sentence of five years' preventive detention would be appropriate in such case, but in other cases it is useless. If the Court thinks that the longest time for which the prisoner ought to be deprived of his liberty is five years, subject to the remission of one-third, then the proper sentence to give is five years' imprisonment, and not five years' preventive detention. This Court does hope that Recorders and Chairmen of quarter sessions will for the future read the case of BARRETT (*supra*) and this case, and remember what this Court has said.

In the present case, the appellant is obviously a public nuisance. He is thirty-nine years old, and in those thirty-nine years he has managed to get eleven convictions. It may be that he has been the victim of short sentences, because the longest sentence he has received is one of twenty-one months. He points out in his notice of appeal that he has never been bound over and has never been "lagged", which means sentenced to penal servitude. For all that the appellant has shown himself to be a public nuisance and a public danger. He broke into a staff cloak room at offices or works and stole the employees' clothes and money, and with eleven convictions behind him all involving dishonesty, he might well have been sent to preventive detention for a long time. The Court has decided, however, that it will not increase the sentence, but will do what the Recorder ought to have done if he thought five

years was the proper period, and that is, substitute imprisonment for preventive detention. To that extent, the sentence is altered.

Sentence varied.

1950. *June* 19.

WILLIAM HENRY SEDGWICK.

Goddard, L.C.J., Humphreys, J., Parker, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE PARKER.

JOHN ROBERT AVES.

1950. *June* 19.

Summing-up — Receiving — Recent Possession — Explanation or Absence of Explanation by Prisoner.

On a charge of receiving stolen property, the proper direction to be given to the jury with regard to recent possession is in these terms: Where the only evidence is that the prisoner is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew that the property was stolen, they should be told that the case has not been proved and therefore the verdict should be Not Guilty. If there is evidence that the prisoner was in possession of property recently stolen and other evidence as well which tends to show guilty knowledge, the jury should be directed, so far as they are dealing with recent possession, in the above-mentioned terms, and the summing-up should then deal with other evidence which may or may not be consistent with the explanation, if any, which the prisoner has given.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on March 23, 1950, of receiving stolen property, and

1950.
June 19.

JOHN ROBERT AVES.

Goddard, L.C.J., Humphreys, J., Parker, J.

was sentenced by the Deputy-Chairman to nine months' imprisonment.

J. L. Poole, for the appellant.
S. A. Morton, for the Crown.

THE LORD CHIEF JUSTICE, in giving the judgment of the Court dismissing the appeal, referred to the facts, which do not call for report, and continued: Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and therefore the verdict should be Not Guilty.

I may add this as an addendum to the formula above stated: If there is evidence that prisoner was in possession of property recently stolen and other evidence as well which tends to show guilty knowledge, then the Chairman should direct the jury so far as they are dealing with recent possession in the terms which I have mentioned, and then go on to deal with the other evidence against the prisoner, if there is any, which may or may not be consistent with the explanation, if any, which he has given.

Appeal dismissed.

Solicitors: H. H. Pugh, Woolwich, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE.

PERCY HEYES.

1950. *July* 17.

Trial—Plea of Not Guilty—Prisoner Given into Charge of Jury—Subsequent Admission of Guilt in Presence of Jury—No Verdict Taken—Conviction Quashed—No Venire de Novo Ordered.

Once a prisoner is in charge of a jury, he can only be either convicted or discharged by the verdict of that jury.

Where, therefore, a prisoner pleaded Not Guilty to an indictment, but, after he had been given into the charge of the jury, admitted his guilt on certain counts in the presence of the jury, but no verdict was taken and the prisoner was forthwith sentenced,

Held, that the treatment of the prisoner's admission of guilt in the presence of the jury as though it were a plea and the failure to take the verdict of the jury after the prisoner had been given into their charge rendered the trial a nullity; but that, as the prisoner was a man of hitherto good character and had been in custody for a substantial period pending the hearing of his appeal, the Court would not exercise its power of ordering a *venire de novo*, and would simply quash the conviction.

Appeal against conviction.

The appellant was charged at Bolton Quarter Sessions on May 24, 1950, on an indictment containing counts for stealing and receiving bicycles. He originally pleaded Not Guilty to all counts, but after he had been given into the charge of the jury and subsequently granted legal aid, he stated, in the presence of the jury, that he desired to admit his guilt on the counts for receiving. No verdict was taken, and the prisoner was sentenced by the Recorder to three years' imprisonment.

C. M. Goulden, for the appellant:

The failure to take the verdict of the jury after the

1950.
July 17.

PERCY HEYES.

Goddard, L.C.J., Hilbery, J., Byrne, J.

appellant had been given into their charge rendered the trial a nullity.

P. J. Corcoran, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: The appellant was charged before the learned Recorder of Bolton on an indictment containing counts for stealing and receiving bicycles. When he was first arraigned, he pleaded Not Guilty to all counts. Two fellow prisoners who were charged with stealing the property pleaded Guilty.

During the opening of counsel for the prosecution, the appellant indicated that he wanted legal aid, whereupon the Recorder asked counsel to defend him. Counsel then indicated that his client desired to withdraw his plea and plead Guilty to receiving. By this time the appellant was in charge of the jury. The shorthand note rather unfortunately does not contain any indication that the appellant himself was asked to plead, but merely a statement that his counsel said that he wished to plead Guilty. Of course, that is not enough; the prisoner must himself plead. However, we are told by both learned counsel that that in fact happened. Thereupon, the jury having heard the prisoner state that he wished to withdraw his plea and to admit his guilt, the proper proceeding was that they should have been told to return a verdict. Apparently counsel suggested to the learned Recorder that that was the proper course, but the learned Recorder said that it did not matter. It does matter, because once a prisoner is in charge of a jury he can only be either convicted or discharged by the verdict of the jury, and as there was no verdict of the jury here, the trial was a nullity. His admission in the hearing of the jury, without the jury being asked to return a verdict which ought to have been returned, was treated as equivalent to a plea. In the case of a plea of Guilty, he never would have been in charge of a jury at all.

In the opinion of the Court, the trial is a nullity, to such an extent that we could set aside the proceedings and order a

1950.
July 17.

PERCY HEYES.

Goddard, L.C.J., Hilbery, J., Byrne, J.

retrial, or *venire de novo*. But we are not going to do that in this case; we are simply going to quash the conviction. As the appellant has been in prison for nearly two months and is a man of hitherto good character, we do not propose to order a retrial. Therefore he may be released.

There is no blame to be attached to learned counsel on either side in this case.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE.

WALTER ALBERT HEWITT.
BENJAMIN JAMES KINALLY.

1950.
July 17.

Sentence—Preventive Detention—Appropriate Minimum—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21.

Principles laid down in SEDGWICK (*ante*, p. 156) with regard to the minimum period appropriate to a sentence of preventive detention repeated.

Appeal, in the case of the appellant Hewitt, against sentence, and in the case of the appellant Kinally, against conviction.

The appellant Hewitt was convicted at a magistrates' court of larceny of lead, and was committed for sentence, under section 29 of the Criminal Justice Act, 1948, to Gloucestershire Quarter Sessions. He was sentenced by the Appeals Committee on June 5, 1950, to five years' preventive detention.

The appellant Kinally was convicted at a magistrates' court of attempted larceny and was similarly committed for sentence

1950. *July* 17.

WALTER ALBERT HEWITT. BENJAMIN JAMES KINALLY.

Goddard, L.C.J., Hilbery, J., Byrne, J.

to East Kent Quarter Sessions. He was sentenced by the Appeals Committee on May 15, 1950, to five years' preventive detention.

Russell Lawrence, for the appellant Hewitt.

No counsel appeared for the appellant Kinally or the Crown.

THE LORD CHIEF JUSTICE: I propose to deal with these two cases together because the observations I have to make will apply to both of them.

The first case is an appeal by Walter Albert Hewitt against a sentence of five years' preventive detention passed by the Appeals Committee of the County of Gloucester, he having been sent forward for sentence for larceny of lead. The Appeals Committee, having heard his previous convictions, passed a sentence of five years' preventive detention. The Chairman said: "The Committee can only feel, as they read that long list of offences, that you have been again a nuisance to society. You have committed a whole range of serious offences. You have had comparatively short sentences and they have not had any effect on you and you have not profited by them, and the decision of the Committee, in your case, is that you must be sentenced to five years' preventive detention".

In Hewitt's Case there are a large number of convictions, but they were all for minor offences, and what moves this Court to think that his case was not a case for preventive detention is that from February, 1942, when he got three months for being found on enclosed premises, there was no conviction of dishonesty until 1947 when at Gloucester Assizes he was sentenced to four months and four months concurrent for housebreaking, and it is obvious that the learned Judge did not regard it as a serious case. After that there was no other conviction of dishonesty until the present, which was again for a comparatively petty theft.

The other case which I directed should be called on at the

1950.
July 17.

WALTER ALBERT HEWITT. BENJAMIN JAMES KINALLY.

Goddard, L.C.J., Hilbery, J., Byrne, J.

same time, because I want to make some observations with regard to sentences of preventive detention, is an application by Benjamin James Kinally who, for attempted larceny, was sentenced at East Kent Quarter Sessions to five years' preventive detention. He has so far appealed only against his conviction, and it is impossible to give him leave to appeal against his conviction because he admitted the offence, although he did not plead Guilty at the trial. In this case the quarter sessions were presided over by a learned Chairman who is also a Recorder, and this is what was said when the sentence was passed, the Bench having retired: "The Court has considered what sentence is the proper sentence to pass upon you here. You have got, of course, a shocking record. You say you have never had a chance, but all I can say is you never took advantage of the chances you were given. You were given plenty of them when you were a young man, but you seem to have made up your mind to lead a dishonest life. Under the new Criminal Justice Act this Court has power to at least curtail your activities, and we propose to. We are only going to impose the minimum sentence, although it has been pointed out by the Lord Chief Justice"—he should have said by the full Court—"that under preventive detention the sentence should be somewhere in the neighbourhood of seven years". That is really a very curious attitude for quarter sessions to take. They remind themselves that this Court has said that seven years should be the minimum sentence of preventive detention to be given, unless in exceptional cases, to which I will refer in a minute. What this Court has actually said is that that is the irreducible minimum and the usual sentence should, if the Court thinks it is a case for preventive detention, be more in the nature of eight years and upwards.

There is no doubt that this was a very proper case for preventive detention, and we think it is most unfortunate that quarter sessions should disregard what this Court has said, and has had to say now on, I should think, half a dozen occasions. Preventive detention is stated in the Act to be for the protection of the public. Everybody knows, because it is also set out in

1950.
July 17.

WALTER ALBERT HEWITT. BENJAMIN JAMES KINALLY.

Goddard, L.C.J., Hilbery, J., Byrne, J.

the Act, that the sentence is to be served in prison. It is served under different conditions for some part of the time, but it is served as a prison sentence and the usual remissions are granted. Therefore, if a sentence of five years is passed, it means that the utmost the prisoner will serve, if he behaves himself, will be three years and four months, which, of course, is very little protection for the public against a man who has shown that he intends to live by crime. More than that, in laying down what we have laid down, and what I desire for the guidance of quarter sessions again to lay down, is that five years' preventive detention should be given only in the case of an old man whom a Court may feel has to be locked up because he will continue to prey on society, but whom the Court does not desire should die in prison or spend his last days in prison. Five years' preventive detention is not a proper sentence to give except in that case. Again I will repeat, for the guidance of quarter sessions, that this Court has not said that merely because we want very long sentences passed but, first, because the intention of the Act of Parliament has to be carried out and, secondly, because the Judges have had the advantage of obtaining information from the Prison Commissioners on this subject and, indeed, on the subject of corrective training also. The Prison Commissioners have entirely agreed with the view which I expressed at a very early stage after this Act came into force, that if sentences of five years' preventive detention are given, it will cause great embarrassment to the Prison Commissioners and those whose duty it is to carry out the sentences because the places which are intended for sentences of preventive detention are limited in number and must of necessity be so.

If a Court feels that it is not prepared to deprive a man of his liberty for more than five years, taking into account the remission that he will get, the proper sentence to pass, except in the case of an old man or some exceptional case, is five years' imprisonment, and sentences of five years' preventive detention are useless for the purpose for which they were designed and may, as I say, cause great embarrassment to the

1950.
July 17.

WALTER ALBERT HEWITT.
BENJAMIN JAMES KINALLY.

Goddard, L.C.J., Hilbery, J., Byrne, J.

authorities. Moreover, it should be remembered that the first part, certainly one-third, of the sentence will in any case be served in an ordinary prison. Therefore, the only effect of such a sentence is that perhaps for the last year in prison the prisoner will have some privileges additional to those which he would have if he was sentenced to ordinary imprisonment.

In the case of Hewitt, we think that it was not really a case for preventive detention at all. It was getting near it, but, as I pointed out, he did keep out of trouble from 1942 till 1947. He then committed an offence which the learned Judge cannot have thought was a very serious offence because despite his record he was sentenced only to four months' imprisonment, and the present case itself is not a very serious case, though lead stealing is becoming too common because lead has become valuable. We have come to the conclusion that the case is not a case for preventive detention at all; therefore, we set aside that sentence and substitute for it one of three years' imprisonment.

In the case of Kinally, as I have already said, the Court refuses to give leave to appeal against conviction. He has not appealed against sentence, and, unless he does, we cannot interfere with the sentence, but we are going to take the same course as the Court did very recently, that is, to order that the appellant be informed that, if he so desires, the Court will extend the time for appealing against sentence and will give him leave to appeal against sentence. He will be informed that that is not being done for the purpose of increasing the sentence, but to enable the Court to reconsider the sentence that should be passed upon him.

I do express the hope that it will not be necessary to lay down again the considerations which quarter sessions should take into account before they pass sentences of preventive detention.

Sentence varied in one case.
Appeal dismissed in one case.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE FINNEMORE AND MR. JUSTICE SLADE.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

1950.
July 6, 7, 8.

Indictment—Amendment—Meaning of "Defective"—Alteration in Matter of Description—Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5 (1).

False Pretences—Obtaining—Obtaining by an Agent—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

By section 5 (1) of the Indictments Act, 1915: "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice".

Counts in an indictment charged various prisoners with obtaining sums of money from a building society by false pretences. At the close of the case for the prosecution a submission was made by the defence that there was no evidence to support those charges, and counsel for the prosecution applied for leave to amend the indictment by substituting in each count for the sum of money alleged to have been obtained "a valuable security, to wit, a cheque" for that sum. The Judge granted leave for the amendment to be made.

Held, that, in order to be "defective" within the meaning of the above subsection, an indictment need not be one which does not charge any offence in law and is, accordingly, bad on the face of it; that an amendment may be allowed to cover alterations in matters of description and probably in many other respects, provided it causes no injustice to the accused person; and that the amendment in the present case was properly allowed.

The responsibility for the correctness of an indictment lies

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

on counsel for the prosecution and not on the Court. If in counsel's opinion the indictment needs amendment, the necessary application should be made before the arraignment of the prisoner.

The appellants S., P., L. and D. were convicted on several counts of an indictment charging them (after amendment) with obtaining cheques by false pretences. With regard to counts 2, 4 and 5 the evidence was that P. or a nominee of his bought a house, which he sold or purported to sell to another nominee at an enhanced price, and the last-named nominee generally sold to another nominee of P., who posed as the borrower from a building society. The society advanced money to the borrower after the usual inquiries and after a report from D., who was a partner in a firm of estate agents, on the value of the premises. The application for the advance actually came from a firm of solicitors acting for the borrower, and generally employed by the society to act for them also. When the amount of the loan had been agreed and the solicitors had reported that everything was in order, a cheque was sent by the society to the solicitors, who paid it into their firm's clients' account, held it as agents for the society until the matter of the advance was finally completed, and then distributed the money represented by the cheque as instructed by the borrower.

Held, that as the solicitors had in each case received the cheque as agents for the building society and would at that stage have exceeded their authority if they had handed it to any of the appellants, there was no evidence on any of those counts that any of the appellants had obtained any cheque, and that their convictions on those counts must, accordingly, be quashed.

On another count (count 3), the evidence was that P. had bought a house which he pretended to sell to S. at an enhanced price. S. applied to the building society for an advance, stating falsely that he paid a deposit and making other false statements in the application form. The house had been valued by D. for the society at an excessive value. The society agreed to lend S. £900 and sent a cheque to the solicitors for that amount. At the time when the cheque was sent, the conveyance and the legal charge to the society had been executed. P. was not charged in this count, but S. and D. were charged with and convicted of obtaining the cheque by false pretences.

Held, that in this case the cheque had been received by the solicitors as agents of S. and that the convictions of S. and D. should be affirmed.

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

Appeals against conviction (on certificate) and in the case of the appellants Pople, Dallimore and Smith, application for leave to appeal against sentences.

The appellants were convicted at Hampshire Assizes on March 23, 1950, after a trial lasting twelve days, of conspiracy to defraud and obtaining valuable securities by false pretences, and were sentenced by Pritchard, J.; Pople and Dallimore to five years' imprisonment and two years' imprisonment (concurrent), Pople also being ordered to pay £750 towards the costs of the prosecution, Lord and Smith to three years' imprisonment and one year's imprisonment (concurrent), and Mallon to eighteen months' imprisonment and twelve months' imprisonment (concurrent).

The indictment, as originally drafted, contained seven counts. The first count charged all the appellants with conspiracy to defraud; the second charged the first four appellants with obtaining money by false pretences; the third charged Smith and Dallimore with a similar offence; the fourth and fifth charged Pople and Dallimore with similar offences; the sixth charged Mallon with attempting to obtain money by false pretences; and the seventh charged Mallon with obtaining money by false pretences. At the close of the case for the prosecution, the indictment was amended, the principal amendments being to counts 2, 3, 4, 5 and 7 which were amended so as to charge obtaining "a valuable security, to wit, a cheque" by false pretences. The appellants were convicted on all counts which concerned them, except that Dallimore was acquitted on count 2 and Mallon was acquitted on count 6.

The case arose out of a series of frauds, as a result of which a considerable amount of money was obtained from building societies. Pople was a dealer in house property and Dallimore was a partner in a firm of estate agents at Southsea. Lord and Smith were associates of Pople, and Mallon was Pople's sister. The charges covered dealings over a period lasting from the middle of 1947 to early in 1949. The general scheme was that loans should be obtained from building societies on properties concerning which false pretences were made as to their

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH. MICHAEL WALTER POPLE. KENNETH ROLAND DALLIMORE. HARRY VICTOR JAMES LORD. CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

value, the identity of the purchasers, the prices paid, etc. In each case the building society paid cheques representing the amount of the advance to a firm of solicitors known as Hobson Thomas, Sherwell and Wells of Portsmouth.

At the close of the case for the prosecution defending counsel submitted that there was no evidence that any of the appellants had obtained any money. Counsel for the prosecution applied for, and obtained, leave to amend the indictment as above stated. Defending counsel then submitted that there was no evidence that any of the appellants had obtained a valuable security, since the cheques had all been received by a member of the aforementioned firm of solicitors. Pritchard, J., ruled that there was evidence to go to the jury on the amended indictment.

J. Scott Henderson, K.C., and *J. T. Molony*, for the appellant, Pople:

This appeal has no merits, but involves a question of law, arising out of the various offences created by section 32 (1) of the Larceny Act, 1916. This subsection creates at most six different offences and between "obtaining" and "causing or procuring delivery" there is a great difference. Evidence that any part of the money charged was obtained will support a charge of obtaining money, but not a charge of causing or procuring delivery.

[SLADE, J.: "Obtaining" means actual obtaining; otherwise there is no point in the alternative charge.]

In this case there was no evidence of an obtaining, though there may have been evidence of "causing or procuring delivery".

Under section 5 (1) of the Indictments Act, 1915, there is no power to amend an indictment so as to charge a new offence. If this power were conferred by the Act, the provisions of section 44 (3) and (4) of the Larceny Act, 1916 (power to convict of false pretences on an indictment for larceny and *vice versa*) would be unnecessary. BENSON [1908] 2 K. B. 270 illustrates the position before the Act. [He referred also to ERRINGTON

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J.,
Finnemore, J.,
Slade, J.

(1922), 16 Cr. App. R. 148; FRAZER (1923), 17 Cr. App. R. 182; and HUGHES (1927), 20 Cr. App. R. 4.] The function of the Act is to enable a Court to remedy a defect, not to alter the substance of the indictment; TUTTLE (1929), 21 Cr. App. R. 85; JENNINGS (1949), 33 Cr. App. R. 143.

[HUMPHREYS, J.: The possibility of prejudice to the accused person assumes jurisdiction. Do you say that there was jurisdiction to make this amendment?]—No: the Court has no jurisdiction to order or permit an amendment altering the statement of offence. Here there was the substitution of a different offence: proof of obtaining any coin supports obtaining money; a cheque is a piece of paper. Proof that any of the appellants obtained part of the benefit does not support any of the amended counts in the indictment. Further, the amendment was made at the close of the case for the prosecution. Even if there was jurisdiction, there was prejudice to the appellants, as the cross-examination would have been directed to different matters.

A count for obtaining a cheque could only be sustained by proof that the cheque was delivered to Wells, the solicitor for all parties, as Pople's agent and that the cheque was under Pople's control from the moment of receipt. This was not the case, as Wells held the cheque as agent of the building society until completion, which *ex hypothesi* was not until after receipt.

[SLADE, J.: You can test the position in this way, by considering whether the mortgagor could sue the solicitor for money had and received the day after it was in fact received.]

I submit he could not.

The conspiracy charged in count 1 was a conspiracy to obtain money. There was nothing to indicate that money was thereby acquired or obtained and no evidence to support the count.

N. R. Fox-Andrews, K.C. and *Humfrey Edwards*, for the Crown.

There is no distinction between "obtaining" and "procuring to be delivered". In many cases the offences must

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

overlap and there is, for example, no distinction between obtaining a valuable security and causing or procuring its delivery to oneself.

[HUMPHREYS, J.: That is different from causing its delivery to someone else.]

Obtaining may be by oneself or one's agent, so that at the moment of obtaining it is under one's control. Pople obtained the cheque in each case, for though the solicitor actually got physical possession, he got it as agent for Pople and on Pople's behalf.

[SLADE, J.: The agent must receive it so that the principal has control at the time of receipt, at any rate in a limited sense.] A mandate was received by the solicitors from the mortgagor to account to Pople for the moneys. Where such mandate was prior in time to the receipt of the cheque, the solicitors were Pople's agents *ab initio*. From the authorities it appears that "obtaining" includes obtaining by an agent: GARRETT (1853), 23 L. J. M. C. 20, at p. 23; COOKE (1858), 1 F. & F. 64, at p. 66. The cheques came into being at Pople's arrangement and by reason of his activities, and Wells was Pople's agent within the meaning of the section. Further, "any other person" means "any other person than his agent". These words must be read into the section.

DOSSI (1918), 13 Cr. App. R. 158 is authority for the proposition that it is possible to amend an indictment good on the face of it. In WEST AND OTHERS, 32 Cr. App. R. 152; [1948] 1 K. B. 709, this Court approved an amendment at the close of the case for the prosecution. [He referred also to MARSTON (1918), 13 Cr. App. R. 203; KILHAM (1870) L. R. 1 C. C. R. 261.]

J. Scott Henderson, K.C., in reply:

The property in the cheque was not at the time of the receipt in the purchaser, borrower or any other person, but in the society. On the prosecution's contention this cannot support a charge of obtaining. The precise sequence of events in any transaction does not appear from the evidence because

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

it was not a proper subject of cross-examination on the counts as settled. This is in itself evidence of prejudice.

Eric McLellan (*Norman Broderick* with him) for the appellant Dallimore:

The general argument for the appellant Pople is adopted. Further, in count 3 where the conveyance and charge were signed before receipt of the cheque, the solicitor still owed a duty to the building society upon receipt of the cheque to satisfy himself before negotiating it: (1) that the property mortgaged was still in existence; (2) that the mortgagees obtained a good title. Until this was done he held the cheque as the society's agent and as an interval must necessarily have elapsed before this was done, there could be no obtaining on this count also.

I. Hill and F. J. Grey, for the appellant Smith, adopted the argument for the appellant Pople.

M. King, for the appellant Lord, also adopted that argument.

J. Jenkins, for the appellant Mallon, also adopted that argument.

Cur. adv. vult.

July 18.—The judgment of the Court was read by:

HUMPHREYS, J.: These five persons appeal by virtue of a certificate granted by the trial Judge against their conviction at the Hampshire Assizes held at Winchester upon various counts of an indictment charging them with the offence of obtaining valuable securities by false pretences with intent to defraud. They also appeal against their conviction upon the first count of the same indictment which charged them all with conspiracy. The conspiracy alleged was one to cheat and defraud the Dunfermline Building Society by obtaining from the society loans upon the security of freehold premises situate in or near Portsmouth by false representations as to the value of such premises, as to the persons entitled to the possession

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH. MICHAEL WALTER POPLE. KENNETH ROLAND DALLIMORE. HARRY VICTOR JAMES LORD. CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

of such premises, and the rights of the persons therein, as to the prices agreed to be paid for such premises by purchasers thereof, as to the amounts paid by such purchasers by way of deposit, and as to the means of such purchasers.

The ground upon which the appeal is based, so far as the first count is concerned, consists of alleged misdirection by the learned Judge. In our opinion there was no misdirection by the learned Judge either as to the law or the facts of the alleged conspiracy. On the contrary, the case was tried with the utmost care and patience, while the summing-up upon this charge was accurate and fair. There was overwhelming evidence in support of the charge, and of the defendants only one, Dallimore, went into the witness-box to deny that charge. His case was somewhat different from that of the other four, and his defence was substantially that it was some other members of the firm in which he was a partner who, if anyone, had grossly over-stated the value of the premises, and generally that he was an innocent party. The jury must be taken to have refused to accept his explanation.

There were in the indictment further charges of obtaining money by false pretences, and it was argued by Mr. Scott-Henderson that the overt acts above mentioned pleaded as particulars of the conspiracy could only be regarded as such in so far as they consisted of misstatements of fact. As the language of the count referred to above shows, those overt acts had nothing to do with the question of whether they were representations of existing facts or not. They were mere statements designed to show that the conspiracy had got beyond the stage of intention and was an existing conspiracy of which they were the overt acts. The conviction of all the defendants on the first count, therefore, stands, and the sentences passed upon them in respect of that count also stand.

We now turn to the other counts of the indictment. The certificate of the trial Judge is expressed as being granted to enable the accused to argue before this Court two points: (1) that the trial Judge had no power under section 5 of the Indictments Act, 1915, to make the amendments which were

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH. MICHAEL WALTER POPLE. KENNETH ROLAND DALLIMORE. HARRY VICTOR JAMES LORD. CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

in fact allowed; (2) that on the indictment as amended there was no evidence to go to the jury that any valuable security had been obtained by any of the accused persons from the society.

As originally drawn, counts, 2, 3, 4, 5 and 7 (there was no conviction upon count 6) alleged against certain of the accused the offence of obtaining various sums of money from the building society by false pretences set out in the various counts. The case was a long one occupying some twelve days, and at the close of the case for the prosecution, objection was taken that there was no evidence to support the charges of obtaining money by the different accused. The matter having been argued, the prosecution applied for leave to amend those counts by altering in each count the sum of money alleged to be obtained to " a valuable security, to wit, a cheque for " that sum of money. That application was granted and the first question argued before us on this appeal was whether the learned Judge had any jurisdiction to direct that amendment. Now, the power to amend an indictment has been contained since 1915 in section 5 (1) of the Indictments Act of that year. That enactment, as is generally known, was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases. Up to that time the powers of amendment had been very limited, and the section in question provides, and, as we think, was intended to provide, that in future the power should be very considerably extended. The section runs as follows: " Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case ". Then follow the all-important words—" unless, having regard to the merits of the case, the required amendments cannot be made without injustice . . .".

The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which in law did not charge any offence at all and therefore is bad on the face of it. We do not take that view. In

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person. There is the most ample power in such a case or in any case where the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by any such amendment to direct that one person should be tried separately from others, or the trial may be postponed. It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, that is the valuable security with which in fact that building society parted. We have no hesitation in this case in supporting the action of the learned Judge in amending the indictment.

The next objection, and a much more serious one, was that, on the amended indictment, the evidence failed to prove that any valuable security was in any case obtained by any of the accused. Now, it seems necessary to state very shortly the manner in which this fraud, as the jury found it to be, was carried out. It was put very clearly by the learned Judge in the course of his summing-up. This is virtually a quotation from the summing-up: In the first place, Pople buys a house or, if he does not buy it himself, he gets a nominee to buy it for him. Then he sells it or purports to sell it to some other nominee at an enhanced price. Then, in most cases, that nominee sells it to another nominee of Pople, and that person poses as the borrower from the building society. The society was prepared to advance money to proposed purchasers of premises upon being satisfied as to the value of the premises and in regard to certain other particulars, and they took the precaution of employing Dallimore, who was a partner in a firm of estate agents at Southsea, to make an independent report to them

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

as to the value of the premises in question. The application always came through some Portsmouth solicitor acting for the proposed borrower, and the society in many cases appointed that solicitor to act also for them in the transaction. When the amount of the loan had been agreed, and when the solicitor in question had reported that everything was in order, a cheque was sent by the society to the solicitor. The solicitor would pay that cheque into his firm's clients' account, and would hold it as agent for the building society until the matter of the advance was finally completed. He would then distribute the money represented by the cheque as instructed by his other clients, that is, the borrower and any other person to whom he was asked by the borrower to pay the money. In practice, in the various cases referred to in the course of the trial, the proposed borrower, who was a mere nominee of Pople, signed a document addressed to the solicitor asking him to pay any money in his hands over to Pople. To take one case, namely that referred to in count 2 of the indictment, premises No. 69 Victoria Road, Portsmouth, were bought by Pople on October 12, 1948, for £1,170, subject to an existing tenancy in favour of a Mrs. McCormack, a lady who was in fact residing in that house and who in truth has never left it. On November 20, 1948, Pople purported to sell that house to Lord for £1,250. Lord in turn purported to agree to sell that same house to a man named Bain for £3,500, but the building society, having made inquiries, were not satisfied with regard to Bain who seems to have been a street bookmaker, and for the moment the matter fell through. Pople then went to a man called Lockyer who was a workman working for him at a wage of £6 10s. a week, and, according to Lockyer, who was called as a witness for the prosecution, Pople asked Lockyer: "Would you mind having a house in your name for two or three weeks for Mr. Smith?". Lockyer agreed, provided there was no trouble or bother. He then signed some document at the request of Pople, and there was put forward to the building society an application for a loan to him on the basis of his having agreed to buy these premises for £3,500. There cannot

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH. MICHAEL WALTER POPLE. KENNETH ROLAND DALLIMORE. HARRY VICTOR JAMES LORD. CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

be the slightest doubt that the whole scheme was a fraudulent means of obtaining from the building society a substantial sum of money by way of advance, and in fact £2,500 was so obtained. A cheque for that amount was sent to a Mr. Wells, a solicitor employed by Pople and, as he said, acting for everybody in the matter, and that gentleman proceeded to do what he was asked to do by Pople, that is, place to the credit of Pople the balance of the money after solicitors' costs and other outgoings had been paid. There was evidence that other of the defendants and Lockyer were well paid for their trouble.

In those circumstances, it was submitted by Mr. Scott Henderson that none of these accused persons obtained that cheque at all. It was, of course, not disputed that if a request had been made by one of them posing as borrower that the cheque should be sent to Mr. Wells as his agent, and that was done, that accused person could be properly charged with having obtained the cheque, but in fact and in law when that cheque was received by Mr. Wells, it was so received in his capacity as agent for the building society and he would have been exceeding his authority if he had at that stage handed it to any of the accused. The cheque itself in fact was made payable to Messrs. Hobson Thomas, Sherwell & Wells—that is Mr. Wells' firm—" agents for Roland C. Lockyer ". In this case therefore, while it might conceivably have been possible upon a proper direction for the jury to find that £2,500 was obtained from the society and shared between the various parties to the conspiracy, it seems to us impossible to hold that there was any evidence to go to the jury that any one of these persons had obtained that valuable security. If there had been evidence that one of them obtained that security, there would have been ample justification for the conviction of all the conspirators upon that charge, since the law is clear that on an indictment for obtaining money or a valuable security by false pretences, a party who has concurred and assisted in the fraud may be convicted as a principal, although not present at the time of making the pretence or when the money was obtained, since in misdemeanours all parties are principals

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

whether present or not. Authority for that proposition is to be found in the case of MOLAND (1843), 2 Moo. C. C. 276.

The facile phrase used by Mr. Wells that he was "acting for all parties" in this matter is, of course, true in a sense, but in our opinion in obtaining and receiving that cheque from the building society he was plainly acting as the agent of Lockyer from the moment when he ceased to hold it for the building society.

Mr. Fox-Andrews argued that in this case Lockyer might be regarded as the agent of Pople so that on the facts it might be said that Pople obtained the cheque by his agent, but in our opinion this is much too refined an argument to be effective.

The conviction, therefore, of Pople, Lord and Smith upon the count must be quashed. The same observations apply to counts 4 and 5, which must be quashed upon the same ground.

In both those cases the supposed purchaser for whose benefit and upon whose application the loans were made was a person other than one of the accused. In none of the three cases was that person alleged in the indictment to be a conspirator.

The facts in count 3 were different. The premises referred to were known as 6, Church Street. That house was bought in May, 1948, by Pople for £720. He pretended to sell it to Smith for £1,250. Smith applied to the building society for a loan stating that he had paid a deposit of £350, which was quite untrue. There were other misstatements in the application form. The house was valued for the society by Dallimore at £1,350. The society agreed to lend Smith £900 and sent a cheque for that amount to his solicitors on September 9. By that date the transaction was otherwise complete, the conveyance having been executed on September 6 and the legal charge to the society on September 7. Nothing further remained to be done, and in law the cheque in question was received by the solicitor as the agent of Smith who was entitled to it. The matter was correctly and clearly put to the jury by the learned

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

Judge at p. 14 of his summing-up as follows: "Smith applied for a loan and the solicitor got a cheque, and the solicitor paid the proceeds of the cheque to Pople as the vendor because Smith was the buyer and therefore the buyer's money would naturally go to the seller. If you are satisfied that the solicitor was acting for Smith . . . and that that was a fraudulent transaction and not a genuine matter at all, you would be entitled to say that the receipt of the cheque for £900 by the solicitor was an obtaining by either of the two prisoners mentioned who you think are concerned criminally, dishonestly, fraudulently, in that matter".

The jury convicted all the persons charged in that count, but in reference to the indictment it appears that the name of Pople had been for some reason omitted from that count. The conviction upon that count of Smith and Dallimore stands.

The facts in count 7 are again somewhat different: the premises in question were No. 37 Havant Road, the occupier of part of which house was an old lady, Mrs. Scrimmings, who had lived there for thirty-six years, and in fact was still there at the date of the trial. In October, 1947, Pople agreed to buy that house from the landlord for £500. He then purported to sell it to a man named Forsdick for £520, who, in a few days agreed to sell it to Mrs. Mallon, Pople's sister, for £1,250. Mrs. Mallon applied to the Abbey National Building Society for a loan of £900, stating that the premises were not let. That application was unsuccessful as the valuers for the building society—not Dallimore but quite a different firm—reported that one room was let to a statutory tenant. Correspondence followed and resulted in Mrs. Mallon writing a letter at the end of February, 1948, in which she stated: "I have been in sole possession since the 19th February" a completely untrue statement. On the faith of that statement, the building society granted a loan of £880 to Mrs. Mallon, and on March 5, 1948, sent a cheque to the solicitor, Mr. Bolitho Way, for that amount. In fact, at that date, Mr. Way would not have been authorised to part with that cheque to

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

Mrs. Mallon: neither the conveyance nor the legal charge to the society had been executed, their respective dates being March 11 and 18.

If, then, Mrs. Mallon, who never set eyes on the cheque, was to be convicted of obtaining it by her agent Mr. Bolitho Way, the case required a careful summing-up to the jury upon the relevant dates. It is clear that in the first instance Mr. Way held that valuable security on behalf not of Mrs. Mallon but of the building society. It may well be that if the indictment had remained in its original form, she might have been convicted, after a proper direction, of obtaining money by false pretences, namely the amount in fact received by her or her confederates as the result of the splitting up of the £880 between them. There was, however, no special direction upon this count, the learned Judge saying that the same considerations as to whether she obtained the cheque applied in this case as in all the other cases. In the absence of such a direction the conviction upon count 7 of Mrs. Mallon, the only person charged, cannot be sustained and must be quashed.

A feature of this case which obviously troubled the learned trial Judge, as it does this Court, is the omission from the indictment of any charge framed upon the language of the second part of section 32 of the Larceny Act which was expressly inserted, as it seems to us, in order to meet such a case as the present. The section enacts that every person who by any false pretence with intent to defraud obtains from any other person any chattel, money or valuable security or causes or procures any money to be paid or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or of any other person shall be guilty of a misdemeanour. Had counts been inserted for causing and procuring under the latter part of that section, it is difficult to see what possible defence would have been open to the accused. In opening the appeals, Mr. Scott Henderson stated frankly that the case of his client, Pople, was devoid of merits, and that he relied upon the defects in an indictment

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH.
MICHAEL WALTER POPLE.
KENNETH ROLAND DALLIMORE.
HARRY VICTOR JAMES LORD.
CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

badly drawn in the first place and made worse by subsequent amendments. The Court was not informed whether the indictment in this case was drawn in the office of the Clerk of Assize or whether it was submitted to counsel for revision before being signed,[1] but we think it desirable to point out that the responsibility for the correctness of an indictment lies in every case upon counsel for the prosecution, and not upon the Court. No counsel should open a criminal case without having satisfied himself upon that point. If in his opinion the indictment needs amendment, the necessary application should be made before the accused are arraigned and not, as in this case, after all the evidence for the prosecution has been called. There may well be amendments which would be properly made at the commencement of a trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution.

This was a badly drawn indictment. As soon as the learned Judge heard the first count read, he rightly directed an amendment of the statement of the date intended to be charged. The amendments made at the close of the prosecution did not improve matters. These mistakes have resulted in great loss of time and expenditure of money, and it is to be hoped will not occur in the future.

On the question of sentence, Pople was, in our view, the head and front of the conspiracy, and fully deserved the sentence of five years' imprisonment passed upon him on counts 2, 4 and 5, all of which the Court has been compelled to quash. He is fortunate indeed in that his name was omitted—we repeat, for some reason which we do not understand—from count 3, on which he would in all probability have been convicted. Dallimore equally deserved the sentence of five years' imprisonment on counts 3, 4 and 5. In one sense, his was the worst case of all, since he betrayed the trust imposed in him by the building society.

In the circumstances, however, we direct that the sentence

[1] The indictment in this case was settled by counsel.

1950.
July 6, 7, 8.

WILLIE CHARLES SMITH. MICHAEL WALTER POPLE. KENNETH ROLAND DALLIMORE. HARRY VICTOR JAMES LORD. CATHERINE LOUISA MALLON.

Humphreys, J., Finnemore, J., Slade, J.

on Dallimore of five years' imprisonment on count 3 shall be reduced to one year to be served consecutively to the two years passed on count one; and in the case of Smith that his sentence of three years' imprisonment on count 3 be reduced to one of six months to follow the twelve months passed on count one. The sentences to be served are therefore as follows: Pople, two years' imprisonment, and the order for costs stands; Dallimore, three years' imprisonment; Lord, twelve months' imprisonment; Smith, eighteen months' imprisonment; and Mallon, twelve months' imprisonment.

Convictions quashed in part.
Sentences reduced.

Solicitors: White, Nash & Brooks, Winchester, for the appellant Pople; MacDonald, Jacobs & Oates, for the appellant Dallimore.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE MORRIS AND MR. JUSTICE SELLERS

1950.
Aug. 22.

ROBERT VICTOR HARRIS

Evidence—Previous Conviction—Suspected Person Loitering—Evidence of Known Character—Order of Conditional Discharge—How far Previous Conviction to be referred to—Vagrancy Act, 1824 (4 *Geo.* 4, *c.* 83), *s.* 4 (*as amended*)—*Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 15—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 12 (1).

By section 12 (1) of the Criminal Justice Act, 1948: ". . . a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act . . .".

The effect of the above subsection is to absolve an offender from the legal consequences which would otherwise flow from a conviction.

Where, however, evidence of a prisoner's previous known bad character may be given in evidence under section 15 of the Prevention of Crimes Act, 1871 (as, for example, to prove that he was a suspected person within the meaning of section 4 of the Vagrancy Act, 1824 (as amended)) and the prosecution are relying on a previous conviction as proof of bad character, the proper course is not merely to produce a certificate of a previous conviction, but to inform the jury that on a particular occasion the prisoner did something showing him to be a person of bad character. Included in the matters which may be proved under this head is the fact that the prisoner admitted in court that he was, or was found by a jury to be, a person who had committed a particular criminal offence.

A summing-up, after referring to a previous conviction of the prisoner in this connection, referred also to another previous conviction of the prisoner, of which no evidence had been given.

Held, that the conviction must be quashed on that ground.

Appeal against conviction.

The appellant was convicted at the County of London Sessions, on April 19, 1950, of being in possession of an imitation firearm, contrary to section 23 (2) of the Firearms Act, 1937, when arrested for an offence specified in Schedule III to the Act, namely, the offence under section 4 of the Vagrancy Act, 1824 (as amended) of being a suspected person loitering with intent to commit a felony, and was sentenced by the Chairman to fifteen months' imprisonment. He was also convicted of being found in possession of housebreaking implements by night, and was sentenced to a concurrent term of twelve months' imprisonment.

To prove the known bad character of the appellant under section 15 of the Prevention of Crimes Act, 1871, evidence was given at the magistrates' court by a detective officer that on December 2, 1949, he had been present at the County of London Sessions when the appellant was convicted of being

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

in possession of housebreaking implements by night and conditionally discharged for twelve months, and a certificate of that conviction was put in. The detective officer was conditionally bound over as a witness and did not give evidence at the trial, but the Chairman referred to that conviction in his summing-up. He further told the jury that on another occasion the appellant had been bound over for being a suspected person loitering with intent to commit a felony. No evidence relating to this last matter had been given during the trial.

L. Craymer, for the appellant:

The previous conviction of the appellant should not have been referred to by the Chairman, in view of section 12 (1) of the Criminal Justice Act, 1948, which provides that a previous order of conditional discharge is to be disregarded, except for certain limited purposes. Further the Chairman referred to another previous conviction of the appellant, of which no proof had been given in evidence, and even if it was proper for him to refer to the first conviction, the jury must have been prejudiced by the reference to the second.

Victor Durand, for the Crown:

Section 12 (1) of the Criminal Justice Act, 1948, does not affect the right of the prosecution to give evidence of the prisoner's known bad character under section 15 of the Prevention of Crimes Act, 1871, in a case, such as the present, where this is permissible. The conviction of December 21, 1949, was relied on by the prosecution not as a conviction, but to establish proof of bad character. It is very unfortunate that the Chairman referred to the other conviction which had not been proved in evidence, but, as the jury had already properly been informed of the first conviction, it is unlikely that their minds can have been seriously prejudiced against the appellant by the disclosure of the second.

HUMPHREYS, J.: This is an appeal brought to this Court as the result of leave granted by the single Judge who,

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

in granting the application for leave to appeal against conviction, said that, "having regard to section 12 of the Criminal Justice Act, 1948, the witness Hardy's evidence, and the Chairman's summing-up, I think that this case should be reviewed by the full Court". It is right to say that the learned Judge before whom the matter came, Parker, J., expressed no opinion of his own on the matter, but thought that the matter required consideration.

The question arises in this way. The appellant was charged on an indictment with a composite offence created by section 23 of the Firearms Act, 1937, which, in effect, provides an additional penalty for a person who has committed any one of certain specified offences including an offence under section 4 of the Vagrancy Act, 1824 (as amended), if that person on being arrested for that offence is found to be in possession of a firearm or imitation firearm. In this case there is no question that the appellant was found in possession of an imitation firearm at the time when he was arrested upon a charge under section 4 of the Act of 1824 (as amended) of being a suspected person loitering with intent to commit a felony. Evidence to that effect was given before the Chairman of London Quarter Sessions and a jury. We have been informed today that there had been a previous proceeding, and we accept the statement of counsel that in that proceeding a jury had been sworn, and had been told of certain previous convictions against the appeallant, that the learned Chairman had then come to the conclusion that it was doubtful whether the jury were entitled to know of those previous convictions, and that he had thought it right to discharge the jury, a course which was unquestionably open to him.

That circumstance accounts for a matter which gave members of this Court some trouble when they were reading the papers, for it was noted that the learned Chairman begins by referring to his ruling, and there is no evidence on the transcript of the shorthand note that he had given any ruling or that any objection had been made to any evidence. But the matter is now clear, so far as this trial is concerned, that,

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

in addition to evidence adduced for the purpose of showing that the accused person was loitering with intent to commit a felony, other evidence was given.

At the magistrates' court a witness, Det.-Constable Hardy, had given evidence and had been provisionally bound over, and his evidence was to this effect: " On December 21, 1949, I was present at the County of London Sessions when Harris was conditionally discharged for twelve months. I produce the certificate of conviction. The defendant Harris in this case is the man to whom the certificate relates ", and the document was then put in. The document was not read to the jury, but in our view there is nothing in that point, because it was a document which was in evidence and the effect of which was subsequently told to the jury by the presiding Judge. It appears to be a document showing that on December 13, 1949, the appellant was in due form of law upon his own confession convicted upon an indictment against him for that he at some date in the previous November was found having in his possession without lawful excuse certain implements of housebreaking. In fact, that evidence was given without objection, but we must take it that objection had been made on some previous occasion, and that the Chairman had overruled the objection.

The first point which is taken on this appeal is this. It is said that section 12 of the Criminal Justice Act, 1948, prevents any reference to the previous conviction. That section provides: " Subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally "—and this was a conditional discharge— " shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act . . .", which may be interpreted as meaning that if the offender commits any other offence during the next twelve months he may be brought up and sent to prison or otherwise

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

dealt with for the earlier offence. In the opinion of the Court, the Legislature was there providing that these methods of dealing with a person who has been convicted, either putting him on probation or discharging him absolutely or ordering that he be conditionally discharged, should not have the effect of a previous conviction for the purpose of other Acts—and there are many—which in different ways and in different language provide that certain disabilities shall follow from a conviction in the case of a person who has already been convicted. It is clear, in our view, that that is the object of the section, and the matter is very well put, I think, in Messrs. Morrison and Hughes' book on the Criminal Justice Act, 1948, where, in a note to the section, the authors say this (at p. 35): "The section absolves the offender from legal consequences which otherwise would flow from a conviction". I think that is exactly what it does do.

In the present case the offence was one under the Vagrancy Act, 1824, s. 4, which was amended by the Prevention of Crimes Act, 1871 (which is headed "Amendment of criminal law in certain cases"). By section 15 of that Act it is provided in regard to the fourth section of the Act of 1824 that, "in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or Court before whom or which he is brought, it appears to such justice or Court that his intent was to commit a felony". That section quite obviously renders admissible in such a case evidence which would otherwise, according to the common law of England, be inadmissible. There may be put before the tribunal of fact evidence of previous bad character of the accused person although he has not himself put his character in issue. No possible objection, in our view, could have been taken to the procedure adopted in this case if the detective-constable, whose deposition I have read, had been present at the trial and had said: "I was in fact present at the Court

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

on the day named when the accused was there; I heard him confess to a charge of having been found in possession of certain implements of housebreaking, and he was then discharged subject to the condition that he commit no offence during the twelve months thereafter". That would have been proof of the accused person's known character in that he admitted in a Court of justice that he had committed a particular offence.

What was done in this case was merely to produce a document which purported to be a record of a conviction of the appellant without any other evidence about it being given. In any future case we think that Courts, whether Courts of summary jurisdiction or Courts trying a case on indictment with a jury, should be careful to see that what the jury are told is not that "the prisoner has been previously convicted" because the conviction itself is not to be regarded for the purpose of any other case as a conviction, but that in fact the prisoner was seen doing this, that or the other, which shows that he is a person of bad character. Included in the matters which may be proved may be the fact that he on a particular day admitted that he was, or was found by a jury to be, a person who had committed a criminal offence. In this case considerable difficulty has arisen because the witness was provisionally bound over and his evidence, of course, was taken quite shortly at the magistrates' court.

Another point was taken which, in our view, is a more difficult and a much more serious one. It is said here that the learned Chairman, in telling the jury that they were entitled to consider the appellant's known character as proved, in the language of section 15 of the Act of 1871, added something which was not justified by any evidence which had been given before the jury. He said this: "Rightly or wrongly, I have admitted the evidence of Harris' previous record. He has been bound over once for being a suspected person loitering with intent to commit a felony". Of that there was no evidence whatever before the jury. There might have been, but there was not any. No doubt the learned Chairman had learned that fact

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

from the proceedings which had been before him when he had discharged the jury, but so far as the jury who were trying the case were concerned, they knew nothing about it and had heard no evidence about it, and for the first time were being informed by the learned Chairman, in his summing-up, of something very prejudicial to the accused person which had never been proved at all. We think that that was such a serious matter that it becomes difficult to uphold this conviction. This Court has always taken the view that to tell a jury that a person has been convicted of something, when in fact there was no evidence that he had been charged with such an offence is in itself a very serious matter, and in our view it is not cured by the argument that in any event the jury would probably have come to the same conclusion because one case was properly before them in which he had been convicted on his own confession and there was no great harm in saying that that had happened twice. That is an argument to which we cannot give effect. It is fair to say that the learned Chairman took great pains over this matter. There were two other persons charged whose cases were differentiated from that of the present appellant, and the learned Chairman in his summing-up said: "Harris"—the present appellant—"is in a different position. He has not for this purpose been previously convicted". That is to say he was directing them in the terms of section 12 (1) of the Act of 1948 that they were not to take into account as a previous conviction the case which had been proved, to which I have referred and which is shown upon the document known as exhibit four. He continued: "But I have ruled as a matter of law that you are for this purpose just as much entitled to know that Harris has been in trouble as you are in the case of the other two, because you are entitled, as I understand the law, for this purpose to know what the man's character is". In our view, that is perfectly correct. "In my opinion it is quite ludicrous to say that a person who has been found guilty, as Harris has, of what in fact is a serious criminal offence, who has been treated by a merciful Court by being discharged

1950.
Aug. 22.

ROBERT VICTOR HARRIS.

Humphreys, J., Morris, J., Sellers, J.

conditionally to be of good behaviour, should be allowed to go to a court, with other people whose convictions are properly before the Court and who are in the position of having their characters disclosed, and say to that Court, 'I am a person of good character' ". There is much to be said for the view expressed by the learned Chairman in that part of his summing-up.

On the whole, we think that there was, quite unintentionally, so much possible prejudice instilled into the minds of the jury by their being told that the appellant had been twice convicted, when in point of fact there was evidence only of one previous conviction, that the conviction ought not to be allowed to stand. It may well be that the jury would have come to exactly the same conclusion if that mistake had not been made, but this Court cannot go into the question of how far the jury would regard two convictions as being worse than one conviction, and for that reason the conviction must be quashed.

Conviction quashed.

Solicitor: Solicitor for the Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE, AND MR. JUSTICE McNAIR

EDMUND WLADYSLAW BROTOW ZIELINSKI

1950. *Oct.* 16.

Evidence—Admissibility—Issue Decided before Case Opened—Proper Procedure.

Summing-up—Corroboration—Adequate Warning and Explanation of Meaning of Corroboration—No Obligation to Refer to Evidence.

Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered.

COLE (1941), 28 Cr. App. R. 43, followed.

Where a Judge has given the jury an adequate warning on corroboration and has explained to them what is meant in law by corroboration, it is unnecessary that he should point out to the jury the pieces of evidence which can amount to corroboration.

Appeal against conviction.

The appellant was convicted at Yorkshire (West Riding) Quarter Sessions on June 28, 1950, of indecent assault on an elderly woman and was sentenced by the Chairman to twelve months' imprisonment.

The case for the prosecution was that the offence had been committed at the woman's house, after the appellant had called there for the purpose of selling bandages. Two other women had given evidence on the depositions of similar alleged indecent assaults, and counsel for the defence informed

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

counsel for the prosecution that he proposed to object to the admissibility of their evidence. He further asked the Chairman to hear argument and rule on the admissibility of their evidence before the case was opened, and the Chairman did so and ruled that the evidence was admissible. Both the witnesses gave evidence, but did not give evidence to the same effect as in the lower Court, and deposed to nothing prejudicial to the appellant. In his summing-up the Chairman told the jury what was meant in law by corroboration, told them of the desirability of looking for it and warned them of the danger of convicting in its absence, but did not point out to them any piece of evidence which was capable in law of amounting to corroboration.

E. John Parris, for the appellant:

The evidence of the two women other than the prosecutrix should not have been admitted. It was tantamount to giving evidence of bad character or a disposition to commit this class of offence. Further, no adequate warning on corroboration was given to the jury by the Chairman, nor did he direct the attention of the jury to any evidence in the case which was capable in law of amounting to corroboration. [He referred to other alleged misdirections in the summing-up.]

P. Stanley-Price, for the Crown, was not called on to argue.

BYRNE, J.: This is an appeal against conviction. The appellant was convicted at the West Riding Quarter Sessions on a charge of indecently assaulting a Mrs. Greaves, a lady of some seventy-three years of age.

The appellant was, apparently, a traveller selling some kind of bandages and he called on the day in question, February 9, 1950, at a number of houses. He suggested to the persons on whom he called that he might try the bandages on their legs to see if they fitted and so forth. The case against him was that he had indecently assaulted this lady of seventy-three

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

years of age in a most gross manner by putting his fingers in her private parts. His defence was that nothing of the sort had taken place.

The appellant first of all contends that certain evidence which was called was inadmissible. Two witnesses were called in addition to Mrs. Greaves, a Mrs. Slater and a Mrs. Lee, and they gave evidence with regard to what had happened when the appellant had called at their houses upon his errand of selling bandages. The evidence of those witnesses was called owing to a matter which arose before the case was opened. As soon as the appellant had been given into the charge of the jury, counsel on his behalf applied to the learned Chairman to rule on the admissibility of the evidence of the two witnesses. He said that he had been informed by counsel for the prosecution that it was proposed to refer to that evidence in the opening and therefore he desired a ruling, before any evidence was given, whether that evidence was admissible. An argument took place and the learned Chairman ruled that the evidence of those other two witnesses was admissible, and accordingly it was given.

As it turned out, the evidence given by those two witnesses was entirely valueless so far as the prosecution was concerned and cannot be said to have been in any way prejudicial to the appellant. The evidence given by Mrs. Slater was different from the evidence which she had given before the magistrates. Having said in her deposition before the magistrates that the appellant had placed his hand up her knickers, at the trial she said that he had touched her calf when adjusting the bandage which he was trying to sell to her. Mrs. Lee, the other witness, did not even go so far as that. There was no suggestion from her that he had touched her.

The result was that that evidence certainly did the appellant no harm at all and in no way prejudiced his case, and although the Court does not decide the question whether evidence given by other witnesses of a previous indecent assault would in the circumstances of this case have been admissible, because it is unnecessary to do so owing to the fact that the evidence did

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

not prejudice the appellant, nevertheless, the Court does desire to reiterate what was said when a similar question arose in the case of COLE (1941), 28 Cr. App. R. 43, and reference may also be made to HAMMOND (1941) at p. 84 of the same volume.

It is unnecessary to relate the facts in the case of COLE (*supra*), but there an argument took place before the trial began with regard to the admissibility of evidence and the learned Judge gave a ruling upon it. It was said by Humphreys, J., who delivered the judgment of the Court in that case (at p. 49): "In our opinion it is most undesirable that such a question should be argued at such a stage of a trial, and this case is an admirable example of the objectionable nature of that practice. The Court does not say for a moment that the practice may not be convenient as saving a little time in a case where the defence to be raised is a matter of common agreement. Where counsel for the defence says to the Court or to counsel for the prosecution: 'My defence is that my client did these things but did them with an innocent motive', then we see no reason why the matter should not be argued upon that basis. But where, as in this case, defending counsel was protesting, and protesting throughout, that the defence was quite different, it is most inconvenient, and, in our opinion, most undesirable, that the learned Judge should be put in the position of having to decide the admissibility of certain evidence because, to use his own language, it seems that the defence of accident has been raised; the learned Judge, no doubt, meant 'is going to be raised'".

Of course, it is quite obvious that a question as to the admissibility of evidence on the ground that a defence of accident or lack of design has been raised cannot be determined merely upon what has taken place before the justices, because the defence may not be the same at the trial. It is desirable, as was pointed out by Humphreys, J., and we point out again now, that if a matter is to be opened by the prosecution to which the defence object that that matter shall not be opened, but that when the appropriate moment arrives

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

in the course of the case—by which time no doubt the defence will have been sufficiently indicated—the matter shall then be argued. The Judge is then in full possession of the nature of the defence which is being raised before him and therefore can rule upon the admissibility of the evidence.

Those are the observations which the Court desires to make, but they are satisfied in this case that there was no damage done by the evidence given by these two witnesses.

The next point taken by Mr. Parris on behalf of the appellant is that there was no adequate warning with regard to corroboration, but the Court cannot agree with that, because it is quite plain from the passages in the summing-up which have been read to the Court that the learned Chairman pointed out the desirability of corroboration and the danger of acting in the absence of corroboration, and he told the jury what in law is meant by corroboration. He put it as some independent testimony which implicates the accused. It is quite true that he did not point out to the jury any piece of evidence which was capable in law of amounting to corroboration, but there was no reason why he should. It is not, in the view of the Court, the duty of the Judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration, though Judges frequently do so. Of course, if a Judge points to a piece of evidence as being capable in law of amounting to corroboration and it turns out that it is not capable of amounting to corroboration then the conviction may be quashed; but there is no duty upon the Judge to point out every piece of evidence which is capable of amounting to corroboration, providing he has sufficiently told the jury what in law is meant by corroboration.

In this case, when the evidence is looked at, it is quite plain that there was corroboration. The corroboration consisted, if the jury accepted it, as no doubt they did, of the evidence of Mrs. Greaves' son that a few minutes after the appellant had left her house he found her in a shocking state, and that she seemed frightened and ashamed. That was circumstantial evidence which confirmed the evidence of Mrs. Greaves in a

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

material particular and was therefore evidence upon which the jury were fully entitled to act. Moreover, in this case they were entitled to act upon the uncorroborated evidence of Mrs. Greaves; and it is not surprising they reached this verdict, because although it was pointed out to them that it was dangerous to act on the uncorroborated evidence of a witness in such a case, nevertheless they were dealing with a woman of seventy-three years of age, and, therefore, perhaps, in their view, certainly in the view of the Court, she was not likely to be suffering from hysteria or exaggeration, from which some younger women or children might suffer in similar circumstances. There is, in the view of this Court, no point with regard to the question of corroboration.

The last matter that is raised by Mr. Parris is that there was misdirection. He has pointed to various passages in the summing-up, but it only remains to say, except with regard to one of those passages, that this Court does not approve of the method of examining a summing-up through a microscope. It is sufficient if the case for the prosecution is put and the case for the defence is fully put. A learned Judge trying a case is not obliged to refer to every tiny particle of evidence or point out the smallest inconsistency which may have emerged in the evidence which has been given by any particular witness. After all, the jury are there to see the witnesses and hear their evidence. This trial did not last very long and the jury were quite capable of making up their minds, having heard the evidence and having observed the demeanour of the witnesses.

There is one passage, which certainly is unfortunate, in which the learned Chairman told the jury that Mrs. Greaves had sworn that the appellant had said: "I am only feeling if you have swollen glands". In fact Mrs. Greaves had not said that. She said it before the magistrates apparently, but she had not said it in the course of the trial and it may be for that reason that the error occurred in the summing-up. In the view of this Court that was not a vital matter, but an unfortunate slip

1950.
Oct. 16.

EDMUND WLADYSLAW BROTOW ZIELINSKI.

Goddard, L.C.J., Byrne, J., McNair, J.

on the part of the learned Chairman which does not go to the root of the case at all.

In the whole of the circumstances of this case, for the reasons I have stated, the Court has come to the conclusion that there is no substance in this appeal and it is accordingly dismissed.

Appeal dismissed.

Solicitors: Field, Roscoe & Co., agents for Emmanuel Austin, Leeds, for the appellant; R. C. Linney, Wakefield, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE McNAIR

THOMAS SCHOFIELD WALKER

1950.
Oct. 16.

Committal for Trial—Taking of Depositions—Leading Questions Asked—Committal not Invalidated—Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *s.* 17.

The appellant appealed on the ground that his committal for trial had been rendered invalid by reason of the fact that, when the depositions were taken in the magistrates' court, leading questions were asked.

Held, that though the method of taking the depositions might have been undesirable, the procedure did not offend against the provisions of section 17 of the Indictable Offences Act, 1848, and the committal was not rendered invalid thereby.

GEE AND OTHERS, 25 Cr. App. R. 198; [1936] 2 K. B. 442, distinguished.

Appeal against conviction and sentence.

The appellant was convicted at Bolton Quarter Sessions on August 22, 1950, of robbery and was sentenced by the Recorder to six years' imprisonment.

1950.
Oct. 16.

THOMAS SCHOFIELD WALKER.

Goddard, L.C.J., Byrne, J., McNair, J.

The appellant accosted a woman in the street as though she were a prostitute, and when she showed resentment he snatched her bag and ran off with it, but dropped it when pursued. At the magistrates' court depositions were taken by means of leading questions, based on a statement which the appellant had made admitting all material facts. At the trial the appellant put forward the defence that he was trying to defend himself against an attack by the woman in the course of which she used her handbag.

G. C. H. Spafford, for the appellant:

A committal for trial is rendered invalid by irregularity in the taking of depositions: GEE & OTHERS, 25 Cr. App. R. 198; [1936] 2 K. B. 442. Here there was an irregularity in that leading questions were put to the witnesses when the depositions were taken.

I. D. L. Glidewell, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: The appellant was convicted at Bolton Borough Quarter Sessions of robbery from a woman whom he accosted in the street as if she had been a prostitute, and when she resented it, he stole her bag and ran off with it. It is true that he dropped it because he was being chased.

The only ground of appeal is that there was a wrongful committal for trial because, as the appellant alleges, the depositions were taken by means of leading questions. Of course, as was pointed out by this Court some time ago in GEE & OTHERS, 25 Cr. App. R. 198; [1936] 2 K. B. 442, as there are no longer grand juries, they having been abolished in 1933, it is important that the committal for trial should be regular because it really takes the place of the finding of the true bill by the grand jury.

Section 17 of the Indictable Offences Act, 1848, under which examining justices sit, and which prescribes their procedure, provides that in all cases where any person shall appear before any justices—leaving out immaterial words—" charged with

1950.
Oct. 16.

THOMAS SCHOFIELD WALKER.

Goddard, L.C.J., Byrne, J., McNair, J.

any indictable offence . . . such justice or justices, before he or they shall commit such accused person for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who should know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation which such justice or justices shall have full power or authority to do ".

In GEE & OTHERS (*supra*) no deposition was taken at all; a statement was signed by the witness, it was before him and he approved it, and it was handed in to the Court. The magistrates thought, and perhaps with some reason, that that was a convenient procedure, but we were obliged to hold that it did not comply with the statute. What happened in this case was that the Recorder was satisfied, and evidence was given to show, that the witnesses here were asked questions. Whether they were asked leading questions or not does not matter for the purpose of the Act, because the Act does not say that they are not to be asked leading questions. There is no doubt it would be undesirable for the justices to allow the witness simply to be examined from a statement, the examining solicitor or counsel pausing now and again for him to say yes or no. In this case, no doubt, the evidence was dealt with in that way because the appellant had made a statement beforehand which really admitted all the facts. He was asking the jury, no doubt, to draw inferences other than those suggested by the prosecution, but, so far as the facts were concerned, he admitted speaking to the woman, putting his arm round her, approaching her in an indecent manner in the street and then taking her handbag from her. At the trial he set up a defence

1950.
Oct. 16.

THOMAS SCHOFIELD WALKER.

Goddard, L.C.J., Byrne, J., McNair, J.

that he was trying to defend himself as she was attacking him with the handbag, but that is another matter.

No injustice has been done in this case, nor could we possibly say that, because leading questions are put when the case is before the magistrates, that invalidates the whole committal; it does not. It may not be a desirable way of taking the evidence, but it is taking the evidence in the way which the statute requires, because the evidence is taken from the witnesses and written down. Most people who are concerned with the administration of criminal law know that there has recently been a committee sitting, presided over by my brother Byrne, to consider the whole question of taking depositions. Unfortunately, it was not appointed until the Criminal Justice Act, 1948, was in draft and before the House, and therefore the report of the committee could not be incorporated in the Act. I have always hoped that the report of the committee will be implemented by legislation for many reasons, one being that their recommendations will take laborious and dull work away from magistrates. But I can only say in this case, the notice of appeal being put forward entirely on the ground that leading questions were asked before the magistrates, that there is no ground for interference, and we cannot hold that there has been a bad committal for trial.

The appellant also appeals against sentence, but a brief reference to his record shows that it is really impossible to interfere with the sentence of six years' imprisonment for robbery in the street. He has a very large number of convictions and sentences ranging from three months to five years. He has been given chances, being sent to approved schools and bound over and also sent to Borstal on two occasions. He has been sentenced at Bolton, Oxford, Gloucester, Manchester Sessions and Manchester Assizes. He was sentenced to five years' penal servitude in 1944. His last conviction was at Manchester in May, 1949, for receiving stolen property, when he was sentenced to fifteen months. Then he was released and worked three days and on June 5 he committed this offence.

In those circumstances we cannot say that the sentence erred in any way, and the appeal is dismissed.

1950. *Oct.* 16.

THOMAS SOHOFIELD WALKER.

Goddard, L.C.J., Byrne, J., McNair, J.

Appeal dismissed.

Solicitor: Edgar Fielding, Bolton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE McNAIR.

MICHAEL MURRAY.

1950. *Oct.* 16.

Evidence—Confession—Objection to Admissibility Overruled—Right of Defending Counsel to Cross-Examine before Jury and Call Evidence on Circumstances of Confession.

Sentence—Corrective Training—Report from Prison Commissioners that Offender is Unsuitable—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1).

On objection being taken at quarter sessions by the defence to the admissibility of a confession, the Recorder heard evidence in the absence of the jury and ruled that it was admissible. The confession was then given in evidence, and the Recorder declined to allow defending counsel before the jury to cross-examine the police on the circumstances of the confession or, after the prisoner had been cross-examined on the confession, to re-examine him on the circumstances in which it had been made. The Recorder directed the jury that they must approach the confession on the footing that it had been properly obtained according to the rules of evidence, so that no unfairness had been done. The jury convicted the prisoner.

Held, that the weight and value of the confession were matters for the jury; that defending counsel was entitled, in the presence of the jury, again to cross-examine the witnesses who had given evidence in their absence on the circumstances in which the confession had been made and to re-examine the

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

prisoner on that matter; that there had been a misdirection in law which went to the root of the case, and that, accordingly, the conviction must be quashed.

A sentence of corrective training or preventive detention should not be passed in the face of a report from the Prison Commissioners that the offender is unsuitable for such punishment.

Appeal against conviction.

The appellant pleaded Guilty at Lincoln City Quarter Sessions on July 7, 1950, to attempted shopbreaking, and was convicted of officebreaking and larceny. He was sentenced by the Recorder to four years' corrective training.

On the charge of officebreaking and larceny, the case for the prosecution was based on a confession by the appellant to the police. Objection was taken by the defence to the admissibility of the confession, and the Recorder, after hearing evidence from the police and the appellant in the absence of the jury, ruled that it was admissible. The confession was then given in evidence, and the Recorder declined to allow defending counsel, in the presence of the jury, again to cross-examine the police on the circumstances of the confession; and also, after the appellant had given evidence setting up an *alibi* and been cross-examined on the confession, he declined to allow defending counsel to re-examine the appellant on the circumstances of the confession. He directed the jury: " You must approach the matter on the footing that there was a confession properly obtained according to our very zealously guarded rules of evidence, so that no unfairness was done in the matter ".

J. R. T. Hooper, for the appellant:

Defending counsel was prevented by the Recorder from cross-examining the police officers, on the trial before the jury, on the circumstances of the confession and again from re-examining the appellant on this issue, after he had been cross-examined on the confession. This was wrong, because the weight, as distinct from the admissibility, of the confession, was a matter for the jury. [He was stopped.]

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

Jean M. Henderson, for the Crown:

Once the Recorder had ruled that the confession had not been induced by any promise and was, therefore, admissible in evidence, to have allowed evidence on this issue in the presence of the jury would have amounted to making the jury a Court of Appeal from the Recorder. There was no suggestion to the jury by the Recorder that the admission of the confession was conclusive against the appellant. He made it very clear in his summing-up that the question whether or not the confession was true was entirely a matter for the jury. They were told that the issue was, was the confession true or was the evidence which the appellant gave at the trial setting up an *alibi* true? In CHADWICK (1932), 24 Cr. App. R. 138, it appears to have been recognised that it was not proper for evidence on the question whether threats had been made to have been heard in the presence of the jury; and in COWELL (1940), 27 Cr. App. R. 191, it appears to have been recognised that it was not for the Judge to leave to the jury the question whether a statement was voluntary or not. [She referred also to BARTLETT *v.* SMITH (1843), 12 L. J. EX. 287.]

THE LORD CHIEF JUSTICE: The appellant was indicted originally at the Assizes for the City of Lincoln for breaking and entering the offices of the Lincoln City Football Club and stealing money. He was also indicted in a second count for attempting to break and enter a shop with intent to commit a felony. At the Assizes he pleaded Not Guilty to the first count, but Guilty to the second count, and owing to lack of time the learned Judge sent the indictment to be tried at the City Quarter Sessions.

The appellant is a thief and a criminal who is well known to the police, and his defence to the charge was, in substance, "You only picked me up because you knew me; you knew I was in Lincoln and therefore you arrested me", and so far that was true. The police, in trying to find out who had broken into the offices of the Football Club, knowing that the appellant was in Lincoln and knowing his character, interviewed him

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

and, according to the police, he made a full confession that he had broken into the premises.

At the trial he denied that he had made this confession voluntarily. He said that he was induced to do so by the promise of the police that they would make it light for him. Further, he went on to give evidence that he was in another place altogether; in other words, he put forward what is commonly called the defence of *alibi*. The only evidence against him was his own confession and, as he was alleging that the confession had not been obtained from him voluntarily but as a result of a promise by the police, the learned Recorder at the request of his counsel, and in this case quite properly, heard at the outset evidence on the issue whether the confession had been obtained voluntarily or not. We are not throwing any doubt upon the principle that we have laid down in ZIELINSKI (*ante*, p. 193). In this case, it was not only convenient but proper that the matter should be decided once and for all at the opening of the case, because the confession was, as I say, the only evidence against the appellant except the evidence of arrest.

The learned Recorder, having heard the evidence of the police and the appellant's own evidence, came to the conclusion that the evidence of the confession was admissible. The appellant had signed the confession in two places. The police gave their account, which the Recorder believed. At the trial the appellant gave evidence before the jury that he was out of Lincoln at the time of the offence, and was cross-examined on his confession. His counsel then desired to re-examine on the circumstances in which the confession was obtained. The learned Recorder would not allow him to do so. He had already refused to allow him to cross-examine the police again on this matter. He ruled that it was a question entirely for him. When he came to sum up to the jury, he said, after dealing with the law with regard to confessions: "I ruled that there were no circumstances in this case which justified the suggestion that the confession which is now before you . . . was a confession which was improperly obtained. I ruled, and I inform you

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

that I ruled, that that confession was a voluntary confession obtained from the prisoner and given by him without any duress, bribe or threat. That is my ruling and you must take it from me in this Court. If I am wrong, somebody else will correct me hereafter. Therefore, you must approach the matter on the footing that there was a confession properly obtained according to our very zealously guarded rules of evidence, so that no unfairness was done in the matter. That is how the matter stands". Then he went on to elaborate to the jury the fact that on the one hand the prisoner had confessed to the police, and that on the other hand he now said that he was elsewhere, and the jury must make up their minds which of those two stories was true.

In our opinion, the learned Recorder was wrong in the course which he took. It was quite right for him to decide in the absence of the jury by hearing evidence whether he could admit the confession; that is to say, he had to rule on the admissibility of the evidence, and as he could find nothing in the evidence which was given before him to cause him to think that the confession had been improperly obtained, he admitted it. But its weight and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it had been obtained. Mr. Hooper was perfectly entitled to cross-examine the police again in the presence of the jury on the circumstances in which the confession was obtained. The confession was in evidence by this time because the Recorder had quite properly ruled that it was admissible, but it was entirely within the right of the prisoner's counsel to cross-examine the police if he so desired, and to try again to show that the confession had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: "You ought to disregard the confession because the weight of the confession is for you".

This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this Court is aware, been the right of counsel for the defence to cross-examine

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

again the witnesses who have already given evidence in the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury.

The jury in this case were told that they were not to consider that matter at all. That seems to this Court to be a complete misdirection on a point of law; and this Court has always taken the view that if a complete misdirection is given on a point of law, which really goes to the root of the question, that must make the conviction bad because, as Channell, J., pointed out in this Court many years ago in COHEN & BATEMAN (1909), 2 Cr. App. R. 197, at p. 207, it deprives the prisoner of a chance of an acquittal from the jury which the prisoner would have had if the law had been otherwise stated. We therefore feel in this case, though there is not the least reason to doubt that the confession was true, that, as the jury were not given the opportunity of considering this matter, the conviction on the first count must be quashed.

Then the question is: What is to be done, because the appellant has already pleaded Guilty at the Assizes, and pleaded Guilty again at the sessions, to the misdemeanour of attempted shopbreaking? It is to be hoped that the Court authorities in the City of Lincoln will in future indorse on the indictment the findings and also the judgment that is entered. In this case there is nothing here to show what the jury found. Of course, we have the shorthand note, but there is nothing on the indictment. The verdict has not been entered up, nor has the sentence, but it is quite clear from the learned Recorder's statement that he was taking both these offences into account because he referred to both of them in passing judgment and he imposed a sentence of four years' corrective training.

This really was the last case in which a sentence of corrective training should have been passed. If the Recorder had imposed a sentence of preventive detention for seven or eight years, it might have been a very proper sentence. The

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

appellant is a man of thirty-three years of age with a long list of convictions against him. He has been convicted on at least ten occasions. In 1940, sixty-five cases of false pretences were taken into consideration. He was convicted again in 1941, when six other cases were taken into consideration; and thirty-two other cases were taken into consideration when he was convicted of housebreaking at Nottingham, and so on. On this occasion he asked for three offences to be taken into consideration. He does not appeal against sentence, but we have to consider what sentence we think should be passed upon the count which stands.

I ought also to have said that what surprises the Court in this case is that not only did the Recorder think that corrective training was suitable for a man with this record, but he passed that sentence although the Prison Commissioners' report was that in their opinion he was unsuitable for corrective training. Because the Prison Commissioners report that a man is suitable for corrective training or preventive detention, that is not of itself a reason why the Court should pass such a sentence; but if they report that he is not suitable for corrective training, it is really a very strong thing to depart from their opinion. It is undesirable to do so because, as we have been trying to point out ever since these new forms of sentence were introduced, if sentences of corrective training—and the same is true of preventive detention, but corrective training more frequently comes before us in this repect—are too freely passed, it will embarrass the Commissioners and the people who have to administer this new form of punishment because the places in the prisons which are assigned for this particular form of treatment will be filled with unsuitable cases. We have pointed out over and over again that corrective training is really a sort of extended Borstal training. A man of thirty-three who is steeped in crime as this appellant is—and who has never shown the least intention of going straight and who commits another offence directly he comes out of prison really would be a very proper subject for a long term of preventive detention. But, as he did not appeal against his

1950.
Oct. 16.

MICHAEL MURRAY.

Goddard, L.C.J., Byrne, J., McNair, J.

sentence, and the Court is forced to alter the sentence and pass a sentence on the charge of misdemeanour, we think that the right and proper thing to do in the circumstances is to pass the maximum sentence for an attempt, that is two years' imprisonment. The order is that the conviction on the first count is quashed and judgment of two years' imprisonment is entered on the second count.

The appellant asked for three outstanding cases to be taken into consideration. This Court has said over and over again that where that is done the list is to be attached to the indictment so that this Court can see exactly what the cases are. That was not done in this case.

Conviction quashed in part.
Sentenced reduced.

Solicitor: The Town Clerk, Lincoln, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MORRIS AND MR. JUSTICE McNAIR.

1950.
Oct. 23.

CHARLES MORRIS.

Sentence—Common Law Misdemeanour—No Limit of Two Years' Imprisonment.

The law is and always has been that for a common law misdemeanour a Court can sentence to imprisonment and fine at discretion, provided that the sentence is not inordinate.

Cawthorne (1879), 5 Q. B. D. 402; affirmed on appeal (1882) 6 App. Cas. 229, followed.

The reasons which led Courts to be very reluctant to impose a sentence of imprisonment for longer than two years because of the severity which the punishment would entail having

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

disappeared with the reforms which took place in the latter part of the nineteenth century and which have culminated in the Criminal Justice Act, 1948, a sentence of imprisonment for a period exceeding two years may appropriately be passed where the circumstances of the offence constituting the common law misdemeanour are very grave.

Appeal against sentence.

The appellant pleaded Guilty at Sussex Assizes on July 21, 1950, to conspiring with other persons to evade duties of Customs on the importation of 10,116 foreign manufactured watches, and was sentenced by Hallett, J., to four years' imprisonment.

B. E. Dutton Briant, for the appellant:

The sentence was in respect of a common law misdemeanour. There is no record for more than a century of a sentence of imprisonment for a term exceeding two years being passed for such an offence, and the limit of two years has become part of the common law by long usage. Further, a longer sentence should not be passed for conspiracy to commit an offence than is permissible in law for the substantive offence. Under section 15 of the Finance Act, 1935, the offence of fraudulently evading Customs duties is punishable by a maximum of two years' imprisonment.

J. Malcolm Morris, for the Crown.

THE LORD CHIEF JUSTICE: This appellant was indicted at the last assizes for Sussex before Hallett, J., on two counts, the first of which charged him with on divers days between May 1, 1949, and December 19, 1949, conspiring with three other persons, who do not appeal, and other persons unknown fraudulently to evade duties of Customs on the importation of 10,116 foreign manufactured watches. There was a second count, which charged him with being knowingly concerned on December 19, 1949, "in a fraudulent attempt at evasion of duties of Customs payable on the importation of 10,116

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

foreign watches ". It is in evidence that the duty and the purchase tax together amounted to something over £9,000.

The appellant pleaded Guilty to the first count and Not Guilty to the second count, and the prosecution, saying that it seemed that the Court could deal satisfactorily with him on the first count, did not ask that he should be tried on the second count and a formal verdict of Not Guilty was returned. The learned Judge, regarding the appellant as the head and fount of the conspiracy, and certainly the most blameworthy of the persons before the Court, said that in his opinion a sentence of two years' imprisonment was inappropriate as not being sufficient and sentenced him to four years' imprisonment and ordered him to pay £200 towards the costs of the prosecution.

The case is one of considerable public importance and, indeed, if I may respectfully say so, my brother Hallett has done a public service in passing the sentence which he did so that it could be considered by this Court, because undoubtedly there has been a widespread opinion that in no case could a sentence of more than two years' imprisonment be passed for a common law misdemeanour.

This case raises two questions, first, whether the sentence is a lawful sentence, and secondly, if it is a lawful sentence, whether or not it is too severe in the circumstances. I will deal with the first point first. It should be remembered that at common law there were comparatively few felonies, murder, rape, arson, burglary, larceny and the offence of mayhem being the principal ones, nor were there a great number of common law misdemeanours. The Judges always claimed to have the right of defining certain acts as misdemeanours, although they never attempted to do so in the case of felonies. The punishment for felony was almost invariably death till the reign of George IV. For misdemeanour the punishment prescribed was always imprisonment or a fine, or both imprisonment and fine. It is abundantly clear, as can be seen by anybody who cares to go into the history of the matter, that the imprisonment and fine

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

were always at the discretion of the Court. Magna Carta did contain a clause providing that penalties should not be excessive; and in the Bill of Rights also it was provided that excessive fines should not be imposed nor cruel and unusual punishments inflicted. Sir James Fitzjames Stephen, the great writer on criminal law in the last century, points out that probably the provision in the Bill of Rights was inserted because of the floggings which had been inflicted on Titus Oates and Bedloe and those concerned in the Popish Plot, which were considered too severe, and also a fine of £40,000 which had been inflicted on John Hampden the younger for his part in the Rye House Plot. Sir James Fitzjames Stephen considers that it was those two matters which caused the Revolution Parliament to insert that section in the Bill of Rights. But there is no doubt, and it was recognised in CASTRO (1879), 5 Q. B. D. 490; affirmed on appeal (1883) 6 App. Cas. 229, that the right of the Court to impose imprisonment and fine at discretion was the law. Indeed, until 1816, the further penalty of the pillory could be imposed for any misdemeanour, but in 1816 the pillory was abolished for all offences except perjury and later on, I think in 1837, it was abolished absolutely.

Of late years, no doubt, the Courts have been very reluctant to impose a more severe penalty than two years' imprisonment but that was because, till the present reforms which took place during the latter part of the nineteenth century, imprisonment was a very severe punishment. In the days when shot drill, crank drill and the treadmill were common, everyday accompaniments of imprisonment with hard labour, no doubt a sentence of two years' imprisonment was regarded as a very severe sentence, and for any period over two years the law provided a sentence of penal servitude. Penal servitude, of course, was served in convict establishments. The discipline was different, the work was different and by section 1 (2) of the Penal Servitude Act, 1891, it is provided that when a sentence of penal servitude is prescribed a sentence of imprisonment for a period not

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J

exceeding two years may be given instead. That is why Courts very often, for offences for which penal servitude up to fourteen years or penal servitude for life could be given, mitigated the punishment by passing a sentence of imprisonment, but the law still remained the same. The law was that misdemeanours could be punished by imprisonment at discretion and there is no statute which has taken that power from the Court. The only alteration which has been made in the history of penal punishment was in 1926, when, in the case of MORRISS (1926), 19 Cr. App. R. 75, for very grave offences under the Criminal Law Amendment Act, 1885, a prisoner was sentenced by Avory, J., to three years' imprisonment, that is to say, two years with hard labour on one count and one year without hard labour on another count, the two sentences to run consecutively. For that offence penal servitude could not be given; it was an offence punishable only by two years' imprisonment, and, there being two counts, the learned Judge thought that it was such a gross case that he imposed three years' imprisonment in all. That led to the passing of the Penal Servitude Act, 1926 (rep.), in which it was provided that, where a Court did impose cumulative sentences of imprisonment totalling more than three years they should be treated as though the sentence were one of penal servitude. In other words, if a Judge imposed a sentence of two years' imprisonment and one year's imprisonment, to run consecutively, the result would be that the prisoner would serve three years' penal servitude.

I should observe that long before 1948 prison discipline had become of a less rigorous character in the sense of the tasks that were allotted to prisoners. The treadmill and shot drill had disappeared. The plank bed had disappeared in the case of prisoners sentenced to hard labour, except that they were required to sleep on a plank bed for the first fortnight only of their sentence, and subsequently it disappeared altogether, with the result that the rigours of a sentence of imprisonment which had existed at the time when Charles Reade wrote in mid-Victorian days had disappeared and there came to be very little

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

difference, if any, between a sentence of imprisonment with hard labour and one of imprisonment without hard labour, and gradually such difference as there was died out. Finally, owing to requirements which made it necessary for prisoners to serve the first year, if not more, of the sentence in local prisons rather than convict establishments, the position at the time when Parliament was asked to consider the Bill which is now the Criminal Justice Act, 1948, was that there was no difference between the treatment meted out to prisoners sentenced to imprisonment and that of those sentenced to penal servitude. Prisoners who were sentenced to penal servitude, and were technically under the Acts convicts, were serving quite long sentences in many cases in local prisons, owing to convict establishments being required for other purposes and the difficulty of getting prison officers. The result was that the Criminal Justice Act, 1948, abolished penal servitude and imprisonment with hard labour. It substituted imprisonment for the various forms of punishment which had hitherto been imposed, and also did away with the old first division and second division sentences of imprisonment.

It therefore follows that the reasons which led Courts as a rule to confine their sentences of imprisonment to two years had disappeared. There were certain offences, the somewhat obsolete offence of blasphemy and I think some offences under the Customs Acts, which still permitted a sentence of three years' imprisonment to be passed even in the days before the 1948 Act, but we need not now consider those separately because the whole system has been altered. Now no sentence except a sentence of imprisonment can be passed, and it is just as well that it should be laid down and understood that for common law misdemeanours, that is to say, any offences for which a statute has not prescribed any particular period of imprisonment, the law is and always has been that a Court can sentence to imprisonment and fine at discretion, provided, of course, that it does not give an inordinate sentence. If it does, prisoners now have their remedy of coming to this Court and asking this Court to reduce it.

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

Hallett, J., in this case, having called attention in passing sentence to what he thought was the law and, as we hold, rightly thought was the law, passed a sentence of four years' imprisonment, and it is said that that is too severe a sentence. In point of fact it has often occurred to me that for some offences, especially those with which we have had to deal in such numbers since the war, black market offences and conspiracy to steal rationed goods, two years' imprisonment is a wholly inadequate sentence. Prisoners, if they behave themselves in prison nowadays, get one-third of their sentence remitted, and it might mean that for a particularly insidious and dangerous conspiracy a prisoner, if he received the maximum sentence according to the widely held belief, would only serve sixteen months.

In the present case the appellant was engaged in what can only be described as wholesale smuggling. It is just as well that it should be understood that smuggling is a serious offence. One has only to read the old books about the days before Free Trade was established in this country, the days before Sir Robert Peel removed so many of the duties on imported goods, to appreciate that smuggling was always treated as a serious offence. It is now common knowledge and common, everyday history that of late years many more goods have been subjected to duty than was formerly the case. Practically everything except foodstuffs is subject to duty, and in many cases subject not only to duty but also to purchase tax, which is another of the devices for providing revenue that has had to be introduced owing to the financial state of the country. In this particular case of an attempt to " run " these watches, as the expression is, the Revenue would have lost, had the attempt been successful, something over £9,000.

The facts show that the appellant either was at the material time, or just previously had been, the owner of four motor cars. At the time when this attempt was detected at Newhaven he was the owner of three; the fourth he had conveniently transferred to his brother-in-law, but it was at Newhaven at

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

the time, and these four motor cars were all fitted with secret compartments. Two of them had secret compartments in the petrol tank. In the case of the other cars there was a specially constructed secret compartment in the boot, and there can be no doubt whatever that these cars had been used and were intended to be used in smuggling into this country goods concealed in these secret compartments.

As I said during the course of the argument, one of the results of this class of traffic is that perfectly innocent people and legitimate travellers who have taken their cars abroad may now easily find themselves detained at the Customs for a long time while the Customs officers make a thorough and detailed investigation of the cars to find out whether or not some of these secret compartments are being used.

The main point that has been put forward on behalf of the appellant is that under the Acts which deal with this matter the maximum sentence that could have been given was two years' imprisonment. The charge refers to section 186 of the Customs Laws Consolidation Act, 1876, which provides that if any person " shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs " and so forth he " shall for such offence forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons ". That was not the only sanction imposed, because by section 53 of the Summary Jurisdiction Act, 1879, the provisions of the Summary Jurisdiction Acts were made applicable to offences under the Excise Acts, and, if the penalties were not paid, there was provision for sentences to be passed. They were not so long as the sentence which could be imposed under section 15 of the Finance Act, 1935, which provides: " Where a person is convicted of an offence under section 186 of the Customs Consolidation Act, 1876 (which relates to evasions of duties of customs and of the laws and restrictions of the customs relating to the importation, unshipping, landing and delivery of goods), the Court

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

may, if it thinks fit, in lieu of ordering him to pay a penalty, order him to be imprisoned for a term not exceeding two years ".

It is perhaps worth remembering that until the financial policy of the country altered in the 1930's, and duties were re-imposed on many articles of commerce, smuggling was a rare offence, because it did not pay. There were only a very few articles which were subject to duty, such as tobacco, spirits and so forth, and the only smuggling that was done in those days was the sort of smuggling of which I suppose most people have been guilty, that of coming back from the Continent with more tobacco or cigarettes or spirits than they declared. It was on a very small scale, and it is perhaps significant that Parliament inserted this more severe penalty of two years' imprisonment in the Finance Act, 1935, which extended the range of articles subject to duty. Then the Finance Act, 1943, provided that there could be a sentence of imprisonment and a fine. However, the first specific Act imposing imprisonment, although imprisonment could have been imposed by the application of section 53 of the Summary Jurisdiction Act, 1879, was the Finance Act, 1935.

Then Mr. Dutton Briant has argued—and, as I ventured to say, I thought it was his best point—that it is not right to impose on a man, under the guise of a sentence for conspiracy, a longer sentence than could be imposed for the substantive offence which he conspired to commit. At first sight that appears a very attractive argument. If a man conspires to commit an offence for which the maximum sentence is by statute two years' imprisonment, it is said that it is not right that, by his being prosecuted for a common law offence, he should be rendered liable to a sentence of imprisonment at discretion. But while that might be so in a great many cases, and while it might be so if the evidence showed that the only matter in which the appellant had been concerned was one definite offence, when a person has been engaged in a traffic which obviously has been going on for many months, and has had four motor cars fitted so that this traffic can be carried

1950.
Oct. 23.

CHARLES MORRIS.

Goddard, L.C.J., Morris, J., McNair, J.

on and on the day on which he is arrested it is found that he is smuggling on a very extensive scale, the same considerations do not apply. As I pointed out, although no doubt it is customary when a person is found in possession of a dozen or twenty or fifty watches to make only one charge against him, there can be no doubt that he is endeavouring to evade the duty on each watch, so that each item which he smuggles could be made the subject of a charge. For the purpose of the penalties they are in effect made the subject of a charge, because the duty on each watch is calculated and multiplied by three. We are not dealing with the case of one isolated offence in December, 1949. We are dealing with a case in which the learned Judge came to the conclusion on the evidence before him—and he was well justified in coming to that conclusion—that the appellant had been engaged for a period of eight months either in preparing to smuggle or probably in actually smuggling. Therefore, in the opinion of the Court, it was a case which deserved and received severe punishment in the hope that other people may be discouraged from doing likewise.

The sentence of four years' imprisonment in this case was a lawful sentence and, being a lawful sentence, in the opinion of this Court it was well deserved and this appeal fails.

Appeal dismissed.

Solicitors: J. E. Dell & Loader, Brighton, for the appellant; Solicitor of Customs & Excise, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER.

1950.
Nov. 21.

FREDERICK ARTHUR FAITHFUL.

Quarter Sessions—Committal for Sentence—Duty of Appeal Committee—Possibility of Appeal against Conviction before Magistrates Pending—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29.

When an offender is committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948, before sentence is passed, the appeal committee, if it is the committee of the County of London or Middlesex Quarter Sessions or any other appeal committee which sits frequently, should satisfy itself that no notice of appeal to quarter sessions against the conviction before the magistrates has been given and that the time for such an appeal has expired. If the time has not expired, the committee should enquire whether the offender intends to appeal, and if he says that he does, the committee should offer an adjournment to its next meeting. If it is a committee which sits less frequently, in a case in which the time for appeal against the conviction before the magistrates has not already expired and no notice of appeal has been given, the committee should ascertain whether the offender is proposing to give notice of appeal. If he says that he does intend to appeal, the committee should offer an adjournment and warn him of the time that may elapse before the appeal is heard and of the fact that it cannot grant bail.

Application for leave to appeal against sentence.

The applicant was convicted by a metropolitan magistrate on August 30, 1950, of larceny and was committed for sentence, under section 29 of the Criminal Justice Act, 1948, to the County of London Sessions. On September 8, 1950, he was sentenced by the Deputy-Chairman to three years' corrective training. On September 11, 1950, he gave notice of appeal to quarter sessions against his conviction by the magistrate, and

1950.
Nov. 21.

FREDERICK ARTHUR FAITHFUL.

Goddard, L.C.J., Byrne, J., Parker, J.

on October 5, 1950, the Appeal Committee of the County of London Sessions dismissed that appeal.

No counsel appeared.

BYRNE, J.: The applicant was committed by a metropolitan magistrate for sentence to the County of London Sessions, under section 29 of the Criminal Justice Act, 1948, and was sentenced to three years' corrective training. The committal took place on August 30, 1950, and sentence was passed by the learned Deputy-Chairman at the County of London Sessions on September 8. On the next day the applicant gave notice of appeal to this Court against that sentence. On September 11 he gave notice of appeal to quarter sessions against his conviction by the magistrate. That appeal had to be heard by the Appeal Committee of the London Sessions, and it was heard and dismissed on October 5. Thus it is seen that an appeal against conviction was heard and disposed of after the applicant had already been sentenced, following on his committal for sentence. That, in the view of this Court, is an undesirable state of affairs, although it is a difficulty which has arisen by reason of the Criminal Justice Act, 1948. In view of that difficulty this Court desires to make some observations with regard to the correct procedure to be adopted when a person has been committed for sentence under section 29 of that Act.

In the case of appeal committees which meet frequently, such as the Appeal Committee of the County of London Sessions or of the Middlesex Sessions, or various appeal committees of quarter sessions in the North of England, the appeal committee should satisfy itself that no notice of appeal against conviction has been given and that the time for appealing has expired, before sentence is passed. If the time for appealing has not expired, the committee should enquire if the offender intends to appeal; if he says that he does, the committee should offer an adjournment to its next meeting. In the case of appeal committees which do not meet so frequently, it is desirable that the committee should ascertain before it

1950.
Nov. 21.

FREDERICK ARTHUR FAITHFUL.

Goddard, L.C.J., Byrne, J., Parker, J.

passes sentence that the offender is not intending to appeal against conviction. Where the time for appealing has not already elapsed, the committee should ascertain whether the offender is proposing to give notice of appeal. If he says that he does intend to appeal, the committee should offer an adjournment and warn the offender of the time that may elapse before the appeal is heard, and of the fact that it cannot grant bail. If these rules are followed, the Court feels that this kind of situation, which is undesirable, will not be so likely to arise.

The applicant's case is without merit. He is thirty-three years of age, and there are six convictions recorded against him. The Prison Commissioners reported that he was suitable and fit for corrective training. The Appeal Committee of the London Sessions took the view that that was appropriate punishment to impose, and in the view of this Court the sentence of three years' corrective training was a proper sentence.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

1950
Nov. 27.

HARRY FRANKS.

Indictment—Defect—Customs Offence—Being Concerned in Dealing with Goods the Import of which is Prohibited—No Allegation of Intent—Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36), *s.* 186.

An indictment charging a prisoner with being concerned in dealing with goods the import of which is prohibited or restricted, contrary to section 186 of the Customs Consolidation Act, 1876, is defective if it does not contain an allegation that the act was done with the intent either to defraud the Crown of

1950.
Nov. 27.

HARRY FRANKS.

Goddard, L.C.J., Hilbery, J., Parker, J.

the duties thereon or to evade the prohibition or restriction applicable to such goods.

FRAILEY *v.* CHARLTON, [1920] 1 K. B. 147, applied.

Appeal against conviction.

The appellant was convicted at Southampton Borough Quarter Sessions on September 20, 1950, of being concerned in bringing into the United Kingdom certain goods, the importation of which was restricted, contrary to section 186 of the Customs Consolidation Act, 1876, and was sentenced by the Recorder to a fine of £25 and ordered to pay £42 by way of costs.

The indictment contained no allegation of intent, and on the hearing of the appeal it was conceded by counsel for the Crown, on the authority of FRAILEY *v.* CHARLTON, [1920] 1 K. B. 147 (which was not cited to the Recorder), that it was defective on that ground.

John Flowers, K.C. and *Alan Fletcher*, for the appellant.
J. T. Molony, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was charged on an indictment containing two counts. The first count, on which he was acquitted, charged him with being knowingly concerned in a fraudulent attempt at evasion of Customs duties contrary to section 186 of the Customs Consolidation Act, 1876. The second count, on which he was convicted, charged him with being concerned in bringing into the United Kingdom certain goods, the importation of which was restricted, contrary to the same section.

Mr. Flowers raised certain objections to the validity of that conviction, about which it is not necessary for this Court to give any decision, since Mr. Molony, who prosecuted for the Customs, has now very properly called the attention of the Court to a case of which he did not know at the time, and of which the defence has not known at any time, FRAILEY *v.* CHARLTON, [1920] 1 K. B. 147, which shows quite clearly

1950.
Nov. 27.

HARRY FRANKS.

Goddard, L.C.J., Hilbery, J., Parker, J.

that the count is bad because it does not conclude with an allegation that what he did he did with intent to evade the prohibition imposed. Therefore, without saying anything about the other matters raised in this case, the Court quashes the conviction on the ground that the second count did not disclose the offence.

The Court awarded the appellant forty guineas costs and the costs of the transcript.

Conviction quashed.

Solicitors: Langham & Letts, agents for Niedermayer & Dalton, Eastbourne, for the appellant; The Solicitor, Customs & Excise, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Sentence—Probation Order—Not to be Accompanied by Fine—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 3 (1), 11 (2), (3), 13.

Although a probation order under section 3 (1) of the Criminal Justice Act, 1948, may be accompanied by an order that the prisoner pay compensation under section 11 (2), inasmuch as the latter merely gives rise to a civil debt and does not carry with it the sanction of imprisonment or any other punishment administered corporeally, a probation order may not be accompanied by a fine, which is imposed by way of punishment with the possibility of a sentence of imprisonment in default.

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

Appeals against sentence.

The appellants pleaded Guilty at Leicester City Quarter Sessions on October 3, 1950, to warehousebreaking and larceny, and in the case of each the Recorder made a probation order for two years and imposed a fine of £25.

Guy H. Dixon, for the appellants:

Section 3 (1) and section 13 of the Criminal Justice Act, 1948, appear on the face to be inconsistent, but when the sections dealing with probation are regarded as a whole, it is clear that section 13 was not intended to apply to them. A fine is a sentence within the meaning of section 21 of the Criminal Appeal Act, 1907, in that it is an order of the Court made on conviction with reference to the person convicted: WILLIAM JONES, 21 Cr. App. R. 59; [1929] 1 K. B. 211. It follows that under section 3 (1) of the Act of 1948, where the Court makes a probation order, it can do so only instead of imposing a fine or any other form of sentence. It is true that the Court can also order the offender to pay damages, compensation or costs when making a probation order, but that is only because it is expressly permitted to do so by section 11 (2) of the Act. That practice is in accordance with the practice which prevailed before the Act of 1948 came into operation. Before the Act a Court had no power to fine for felony, and never fined for felony when making a probation order. Section 1 (2) of the Probation of Offenders Act, 1907 (rep.), enabled the Court to require the offender to enter into a recognisance to be of good behaviour to appear for sentence when called upon. Section 3 (1) of the Act of 1948 was substituted for this section, and, with certain modifications, continued the system, the essence of which is that, where a probation order is made, sentence should be postponed. To sentence an offender at the same time as placing him on probation would make it impossible for the Court to sentence him again later for the same offence if he either failed to observe the requirements of the probation order or committed another offence during the probation period. The powers of the Court under

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

section 6 (4) (*b*) and section 8 (5) of the Act of 1948 to deal with the offender for the offence in respect of which the probation order was made would thus be rendered ineffective and a probation order would lose much of its sting.

The provisions of section 13 are admittedly wide, but are merely intended to enable a court of assize, or quarter sessions, to impose a fine for felony, which it had no power to do before the Act of 1948, except for manslaughter, and so to bring the position into line with the common law power to fine for misdemeanour. It was not intended to strike at the heart of the probation system set up by the earlier sections of the Act.

J. P. Stimson, for the Crown:

A fine is admittedly a sentence and is *prima facie* precluded by section 3 (1), but section 13 is a particular exception to the general prohibition, just as is section 11 (2), which expressly permits an order to pay damages or compensation. Such an order is a sentence: WILLIAM JONES, *supra*. The intention of the Act is to permit certain specified pecuniary penalties in addition to ordering probation. The alternative sanction of a fine under section 6 preserves the enforceability of the probation order.

THE LORD CHIEF JUSTICE: The question which arises in these cases, which are brought before us on a certificate by the learned Recorder of Leicester, is whether in making a probation order a Court can at the same time impose a fine. The point is one of some importance, because some Courts of Quarter Sessions have been in doubt about it. The Court will deal with this matter now, so that Quarter Sessions may be left in no doubt on the subject.

By section 3 (1) of the Criminal Justice Act, 1948, it is provided: "Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years". The words "may, instead of sentencing him" may be interpreted "the court may instead of punishing him", because a fine is a punishment. It is then provided: "Provided that (without prejudice to the power of the court to make an order under subsection 2 of section 11 of this Act) the payment of sums by way of damages for injury or compensation for loss shall not be included among the requirements of a probation order". I will deal with section 11 in a moment.

Section 3 (5) provides this: "Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order (including any additional requirements proposed to be inserted therein under subsection (3) or subsection (4) of this section or under the next following section) and that if he fails to comply therewith or commits another offence he will be liable to be sentenced for the original offence . . .". In other words, if a probation order is made and its terms are broken, the probationer can be brought back and sentenced for the offence of which he has been convicted by the Court which has convicted him. It not infrequently happens that a person, while he is on probation, commits another offence, and when he does so it is right, in order to impress on offenders that probation is not a formality, that he should be brought back and sentenced for the offence in respect of which he has been put on probation.

When we turn to section 11, it is provided in sub-section (2): "A court, on making a probation order or an order for conditional discharge or on discharging an offender absolutely under this Part of this Act, may, without prejudice to its power of awarding costs against him, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable". Then a provision is made that in any case the damages and compensation are not to exceed

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

£100; and there is a provision in sub-section (3) that "An order for the payment of damages or compensation as aforesaid may be enforced in like manner as an order for the payment of costs by the offender", that is to say, as a civil debt and not in any way as carrying the sanction of imprisonment or other punishment administered corporeally. Damages or compensation are in no sense a fine. A fine can always be enforced by imprisonment, but damages or compensation cannot be. It may be that if damages or compensation are ordered to be paid and are not paid civil proceedings can be taken; and if it should turn out that the defendant is contumaciously refusing to pay when he has the means of paying, the provisions of the Money Payments (Justices' Procedure) Act, 1935, come into force, because damages and compensation have to be enforced in the same manner as a civil debt.

The only matter that causes any doubt is that section 13 of the Act provides: "Any court before which an offender is convicted on indictment of felony (not being a felony the sentence for which is fixed by law) shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him". The history of that section and the reason for importing it into the Criminal Justice Act is well known. There were certain felonies, principally those under the Larceny Act, in which a court of summary jurisdiction had power to fine. That was because it was considered desirable in the case of petty thefts that a court should be able to fine instead of sending to prison; but in cases which came before a Court of Assize or a Court of Quarter Sessions on indictment there was no power to fine until this Act of 1948, except in the one case of manslaughter. Manslaughter was the only felony for which a Court could fine. The reason for that was that any form of homicide was felony if it was not justifiable or excusable, and as everyone knows, the offence of manslaughter varies enormously in seriousness according to the circumstances in which it is committed. It may approach murder or it may be of the most technical description, and in the Offences

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

against the Person Act, 1861, a provision was inserted that the felony of manslaughter could be punished by a fine. Until 1948 it was the only felony that could be punished in that manner, though it had seemed not only to the Judges but to other persons interested in the administration of the criminal law that it was unfortunate that the old common law which prevented a Court from fining for felony still prevailed. Over and over again one has been met at Assizes with an offence which technically was a felony and in which one would have been very glad to have imposed a fine by way of punishment, but the Court had not the power to do it. The Court was very often, therefore, left in the position that it had either to send a person perhaps of hitherto excellent character to prison for a comparatively small offence or else bind him over, which was inflicting no punishment. That is the reason why Parliament in the Act of 1948 gave to Courts trying offences on indictment the same power as Courts of summary jurisdiction had in certain cases, and now have in all cases, of felony, that is to say, the power of imposing a fine instead of imprisonment.

Section 13 cannot, in our opinion, possibly be read as applying to the preceding sections dealing with probation, to which I have referred, because that would be giving it a contradictory effect, and it is not necessary for the true construction of section 13 to give it that contradictory effect. Under those earlier sections it is quite clear that the Court has power to order the payment of sums of money not by way of punishment but by way of compensation. When I say " not by way of punishment " I emphasise that, because if it was by way of punishment provision would be made for inflicting a sentence of imprisonment in default. It might be said that under sub-section (5) of section 3 the words " if he fails to comply therewith "—that is with one of the terms of the probation order—" he will be liable to be sentenced for the original offence " might cover it, but, as Mr. Dixon has pointed out, that cannot be the true construction of sub-section (5), because the offender would already have been sentenced and there would be no power, if the Court was

1950.
Nov. 27.

JOHN HENRY PARRY.
GEORGE JULIAN PARRY.
DENNIS MARSHALL SPRIGGS.

Goddard, L.C.J., Hilbery, J., Parker, J.

informed that he had committed another offence, to bring him up and punish him a second time for the offence for which he had already been punished by the infliction of a fine.

In the opinion of the Court it is plain, when one considers the fasciculus of sections dealing with probation, that the words in section 13 " or in addition to dealing with him in any other manner in which the Court has power to deal with him " cannot include the making of a probation order. If the Court makes a probation order, it has no power to fine. If it decides to fine, it cannot make a probation order. Consequently these sentences, as they have been imposed, cannot stand. We set aside the probation orders, but the fines will stand, with a penalty of three months' imprisonment in default of payment.

Sentences varied.

Solicitor: Town Clerk, Leicester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

1950.
Dec. 5.

RONALD MORRISON GRANT.

Quarter Sessions — Committal for Sentence — Notice of Previous Convictions—Time for Service—" At Least Three Days Before the Trial "—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 23 (1), 29 (3).

By section 29 (3) of the Criminal Justice Act, 1948 : " Where an offender is . . . committed for sentence [to quarter sessions after conviction by a court of summary jurisdiction] . . . (a) the appeal committee or court of quarter sessions . . . shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment . . .".

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard, L.C.J., Hilbery, J., Parker, J.

The above provision means that, once an offender is committed to quarter sessions for sentence, he is to be treated in all respects as if he had been committed for trial to quarter sessions and came before them as a prisoner who had pleaded Guilty. A notice, therefore, under section 23 of the Act, setting out previous convictions with a view to qualifying the offender for a sentence of corrective training or of preventive detention or for an order under section 22 that he should report, which by the terms of sub-section (1) of that section has to be served " at least three days before the trial ", may, in the case of a committal to quarter sessions for sentence, be served at any time up to three days before the appearance of the offender at quarter sessions for sentence.

As a general rule, a sentence of corrective training should be for a period not less than three years.

Appeal against sentence.

The appellant pleaded Guilty at Swindon magistrates' court on August 3, 1950, to two charges of larceny, and in view of his record, was committed to Wiltshire Quarter Sessions for sentence under section 29 (1) of the Criminal Justice Act, 1948. On the same day a notice under section 23 of the Act, setting out two previous convictions, with a view to qualifying the appellant for corrective training, was served on him. On August 30, 1950, the Appeal Committee of Wiltshire Quarter Sessions imposed a sentence of two years' corrective training.

W. M. Huntley, for the appellant:

The notice of previous convictions was not served " three days before the trial ", in accordance with the requirements of section 23 (1) of the Act. " The trial " for this purpose is the hearing before the magistrates, who alone are concerned with the issue of guilt. This is reinforced by a consideration of sub-section (5) of section 29, which shows that the appeal committee, which is concerned with sentence only, is distinct from a Court trying the case and coming to a decision on the facts.

E. R. Mills, for the Crown.

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard, L.C.J., Hilbery, J., Parker, J.

THE LORD CHIEF JUSTICE: The appellant pleaded Guilty before a court of summary jurisdiction at Swindon to two charges of larceny. The justices consented to deal with the case summarily, but, in view of the appellant's record, committed him to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948.

The reason why the Court gave leave to appeal in this case was not that they had any doubt on the true construction of the Act or on the invalidity of the point which was put forward by the appellant, but because they thought it desirable that they should give a decision on this point in case quarter sessions should have any doubt about it, or in case other persons convicted attempt to raise the same point. The sentence passed by the appeal committee of quarter sessions was one of two years' corrective training.

The point taken on behalf of the appellant was this. Section 23 of the Act provides that notice of previous convictions, with a view to showing that the prisoner is qualified either for preventive detention or for corrective training or for an order under section 22 that he should report, must be served three days before the trial. The contention was that the appellant had been tried by the Wiltshire justices at Swindon, and had only been sentenced by quarter sessions, and as the notice was not served on him before the hearing before the justices, he could not receive a sentence of corrective training.

In the opinion of the Court it would be giving far too narrow a construction, and a most unfortunate construction to section 29 of the Act, if that contention were upheld. It would mean that quarter sessions, as the sentencing Court which has to deal with many young offenders who have two or three convictions recorded against them, could practically never pass a sentence of corrective training. It would be a ground for asking Parliament very soon to alter the law if that were the case, because corrective training is a new sentence that has been introduced with a view to continuing for a definite period the sort of treatment which young men

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard, L.C.J., Hilbery, J. Parker, J.

get at Borstal after they are no longer, by reason of their age, qualified for Borstal.

Section 29 provides that where there has been a conviction before magistrates, if they find out that the record of the prisoner is such that he deserves a heavier sentence than they can give—which is six months for one offence or, if there is more than one offence, not more than twelve months in all—they can commit him for sentence to quarter sessions. When he is so committed, he is, in the case of a county quarter sessions, dealt with by the appeal committee of quarter sessions. The reason for that procedure is well known: it was to get rid of the effect of the two decisions of this Court in SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 223, and GRANT (1937), 26 Cr. App. R. 8, in which the Court was obliged to hold that if a prisoner had been convicted by magistrates they could not then commit him for trial, because when he got to trial he could plead *autrefois convict*. This new procedure, therefore, has been introduced that when magistrates have convicted after hearing the evidence, if they feel that the sentence which they can pass is inadequate, they can commit the offender for sentence to quarter sessions. Section 29 (3) provides: "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment". In our opinion, that sub-section clearly means that once a prisoner is committed for sentence to quarter sessions he is to be treated in all respects as though he had been committed for trial to quarter sessions in the first instance and came before quarter sessions for trial as a prisoner who had pleaded Guilty.

It is to be noticed that an express provision is inserted to enable an offender in such a case to appeal. Everyone knows that an appeal from a conviction before magistrates does not come to this Court; it goes to quarter sessions, and if a prisoner

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard, L.C.J., Hilbery, J., Parker, J.

has been committed for sentence to quarter sessions, if he wishes to dispute his guilt, he still has to appeal to quarter sessions. Then, so far as sentence is concerned (sub-section (3) (*d*)) " If the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass "—that is more than six months or more than twelve months, where there is more than offence—" the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment; and the provisions of the Criminal Appeal Act, 1907, shall apply accordingly ". Then there is a sub-section (sub-s. 5) on which reliance was placed by Mr. Huntley, who has put every point before the Court which could be put, which provides: " In relation to an offender committed for sentence under this section, sub-section (1) of section 23 of this Act shall have effect as if for the words ' by the verdict of a jury ' there were substituted the words ' by the appeal committee or the court of quarter sessions, as the case may be, and not by the verdict of a jury ' ". That is because if the prisoner disputes his convictions, of which notice has been given, the sub-section provides that the issue is to be tried by a jury. Sub-section (5) is dealing with the case where the offender is brought before the appeal committee, and it means that the appeal committee for that purpose, if I may say so, is a jury, and that the appeal committee shall try the issue instead of it being tried by a jury. Sub-section (3) as a whole seems clearly to show that Parliament intended that every proceeding which takes place before quarter sessions shall be treated in exactly the same way as if they were trying the offender originally and not merely dealing with him for sentence.

In our opinion, these considerations show that it is open to the police or other appropriate authority to serve notice of previous convictions three days before the prisoner is brought before quarter sessions for sentence, and if that is done quarter sessions can then pass any sentence as regards which it is requisite that notice should be served. We cannot hold in this case that the trial was the incomplete trial which took

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard, L.C.J., Hilbery, J., Parker, J.

place before the magistrates, because in our opinion for this purpose the trial is not complete until sentence has been passed or the prisoner has been ordered to be discharged. That deals with the question whether quarter sessions had power to pass this sentence.

The question whether it was a sentence which they ought to have passed is quite another matter. This Court has pointed out more than once, and has done so after the Judges of the King's Bench Division have had the advantage of discussing the matter with the Prison Commissioners, who know, as we cannot know, the discipline and training which is given in a sentence of corrective training, first of all that corrective training is of very little use in the case of people of what I may call mature age. The sentence is one which is intended to give an extended Borstal treatment, and to try to train an offender instead of merely imprisoning him. It is a sentence of imprisonment; there is no doubt about that, though unfortunately once or twice, in passing this sentence, Courts have said: "We are not sending you to prison". They are sending the offender to prison, because a sentence of corrective training has to be served in prison. But then, again, as a general rule, without saying it applies in every case, a sentence of two years' corrective training, which means in effect one year and four months, because a prisoner who behaves himself gets exactly the same remission under corrective training as he does under imprisonment, is of very little use for the purpose of giving the offender the benefit which it was designed he should receive from this new form of sentence. We have more than once pointed out that a sentence of two years is, as a rule, inappropriate. If corrective training is to be imposed, three years, which means in effect two years, is the least sentence which is likely to be of any use, and, as I have said, the Court has laid that down after we have had the advantage of hearing the views of the Prison Commissioners, who are the authority entrusted by Parliament with providing for corrective training.

1950.
Dec. 5.

RONALD MORRISON GRANT.

Goddard L.C.J., Hilbery, J., Parker, J.

[The learned Lord Chief Justice then reviewed the facts of the case and said that, in the opinion of the Court, a sentence of two years' imprisonment, with an order under section 22 of the Act of 1948, should be substituted for the sentence passed.]

Sentence varied.

Solicitors: Tarry, Sherlock & King, agents for Townsends, Swindon, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

1950.
Dec. 6.

ALEXANDER SHEPHERD.

Sentence—Corrective Training—Adverse Report from Prison Commissioners—Duty of Court—Criminal Justice Act, 1948 (10 & 11 *Geo.* 6, *c.* 58), *s.* 21 (1).

Except in a wholly exceptional case, a sentence of corrective training should not be passed in the face of a report from the Prison Commissioners that the offender is unsuitable for such a sentence.

MURRAY (*ante*, p. 203) followed.

Appeal against sentence.

The appellant pleaded Guilty at Bournemouth Quarter Sessions on October 23, 1950, to shopbreaking and was sentenced by the Assistant Recorder to four years' corrective training. The report of the Prison Commissioners was that the appellant was unsuitable for such a sentence.

D. H. Stansfeld, for the appellant.

No counsel appeared for the Crown.

1950.
Dec. 6.

ALEXANDER SHEPHERD.

Goddard, L.C.J., Hilbery, J., Parker, J.

THE LORD CHIEF JUSTICE: This appellant was given leave by Streatfeild, J., to appeal against a sentence of four years' corrective training passed upon him by the learned Assistant Recorder of Bournemouth. There is a point in the case that the convictions were not put to the appellant in open court, although there is no doubt that he admitted them and they were proved, but we are not interfering with the sentence on that ground. We are interfering on the ground that this was not a case for corrective training at all. The Prison Commissioners reported against corrective training. The learned Assistant Recorder said that he differed from them. We have pointed out more than once, and I do hope that Recorders and chairmen of quarter sessions will take notice of what this Court has said, that if the Prison Commissioners report in favour of corrective training, it does not at all follow that the Court must send the offender to corrective training. The Court may take the view that, owing to the gravity of the crime or other matters, it should pass a sentence of imprisonment instead, or, of course, in a proper case even give a conditional discharge. The report of the Prison Commissioners that an offender is suitable for corrective training only means that if the Court sees fit to give a sentence of corrective training they think that it is a case in which they can make something of him.

The position is wholly different where the Commissioners report that an offender is not fit for corrective training, because that means that the Prison Commissioners, who know the conditions under which sentences of corrective training are served and the discipline or training which prisoners will receive, have formed the opinion from the facts of the case and the disposition of the prisoner and so forth that they will not be able to do anything with him; in other words, that he is not a man whose character gives any hope that a sentence of corrective training will reform him. That is why this Court has said more than once, and I repeat with all the emphasis I can today, that if the Prison Commissioners advise against corrective training in any particular case it is most undesirable that the Court should disregard

1950.
Dec. 6.

ALEXANDER SHEPHERD.

Goddard, L.C.J., Hilbery, J., Parker, J.

that expression of opinion by the Commissioners and should do so only in wholly exceptional cases. One of the reasons why it is so important that that should be observed is that the number of institutions and places where corrective training can be given is strictly limited, and if cases which the Prison Commissioners regard as unsuitable are sent to corrective training they will not be able to do any real good during the period of corrective training. If the Prison Commissioners come to that conclusion and if the Court disregards it, it means that the accommodation in the prisons specially set aside for corrective training will be filled up with unsuitable cases. There are only a limited number of places and they ought to be kept for cases in which the Commissioners feel, with the experience at their command, they will be able to do some useful work if that sentence is given.

In this case this young man of only twenty-four has no less than eighteen convictions. I disregard any before the fourth conviction. He has had fourteen convictions between February 21, 1944, and August 4, 1949. In addition to that, he was in the Army for a short time and was discharged with a bad character. It is true that the Courts where he has been principally convicted are in Scotland; in fact I think all of them are in Scotland except for a conviction at Poole for being drunk and disorderly with violence. The Bailiffs' Courts and Sheriffs' Courts in Scotland are not within our jurisdiction, but when the appellant does come within the jurisdiction of the English Courts we must regard his record and see what is the right course to take with him. He is a man who, in our opinion, has been to some extent the victim of short sentences. Time and again he has received three months, six months, four months, which have not been of the smallest use. The consequence is that we now have him here, a public danger. He is no sooner out of prison that he is committing an offence and going back. The Court sets aside the sentence of corrective training and substitutes for it the same sentence of imprisonment.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

ROBERT ABRAHAM COHEN.

1950. *Dec.* 18.

Customs—Harbouring Uncustomed Goods—Burden of Proof—Direction to Jury—Customs Consolidation Act, 1876 (39 & 40 *Vict. c.* 36), *ss.* 186, 259.

On a charge of knowingly harbouring uncustomed goods, the prosecution must prove that the defendant knowingly harboured the goods and that the goods were subject to duty. The finding of the goods in the defendant's house or premises under his control is *prima facie* evidence of knowingly harbouring them. Once it is proved that the defendant knowingly harboured goods subject to duty, section 259 of the Customs Consolidation Act, 1876, throws on him the burden of proving that the goods were in fact customed, that is to say, that duty has actually been paid or that the goods were declared and that the Customs officers, in the exercise of their discretion, permitted their entry. If the defendant is unable to prove either of these facts, there is an onus on him to give some explanation of his possession from which the jury may infer that he did not know that duty had not been paid. If he fails to give any explanation, the jury are entitled to convict of harbouring; if he does give an explanation, the jury should be directed that if the explanation either satisfies them that the defendant did not know that the goods were uncustomed or leaves them in doubt on that matter, he is entitled to be acquitted.

The jury should be reminded that intent to defraud the Revenue is a necessary ingredient of the offence, but that this can usually be inferred from the surrounding circumstances.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on July 20, 1950, of knowingly harbouring uncustomed goods, namely, 352 Swiss watches and other articles, and was

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

sentenced by the Deputy-Chairman to twelve months' imprisonment.

The appellant carried on a jewellery business at his house in Edgware and since 1948 had done a considerable business in buying and selling watches. On February 19, 1949, two Customs officers visited the premises and asked where the appellant had acquired the watches which he was selling. The appellant gave the names of two firms and showed the officers about thirty watches, which he said he had for repair. On being asked if he had any more watches on the premises, he replied that he had not and invited the Customs officers to look round. A large number of watches were found in the upstairs portion of the premises, including 361 new Swiss watches and five American gold wristbands, all of which were in two canvas bags under a bed.

At the outset of the case, in the absence of the jury, it was agreed between the prosecution and the defence, that if the defendant satisfied the jury that he had bought any of the goods in the ordinary way of business from either of the firms which he had named to the Customs officers, the prosecution would accept that duty had been paid in respect of those goods.

The material portions of the summing-up appear in the judgment.

A. P. Marshall, K.C. and *Montague Waters*, for the appellant:

The summing-up of the Deputy-Chairman on onus of proof was unsatisfactory. In particular, the materiality of the appellant's knowledge that duty had not been paid was not made clear to the jury, though this was clearly an ingredient of the offence. The matter was left to them on the simple basis: Has the defendant proved that duty in fact has been paid? [Various passages of the summing-up were referred to.] Secondly, the Deputy-Chairman himself introduced a matter which should not have been before the jury, in that after the

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

cross-examination of the appellant by counsel for the prosecution had concluded, he himself cross-examined the appellant with regard to certain invoices relating to watches supplied by the appellant to a customer at Penzance. This matter had not hitherto been referred to by counsel on either side and was, it is submitted, irrelevant. Further, the appellant was improperly cross-examined with regard to character by the Deputy-Chairman, in that he was asked if he was not an undischarged bankrupt. Finally, a Customs officer had referred to a notebook to refresh his memory, but the book had not been put in evidence, yet the Deputy-Chairman handed this book to the jury. The cumulative effect of the matters complained of rendered the trial unsatisfactory.

J. P. Widgery, for the Crown:

The direction of the Deputy-Chairman on onus of proof, fairly considered, was accurate and adequate. It should be regarded in the light of the agreement arrived at between opposing counsel at the outset of the case. In view of that agreement, the question of the appellant's knowledge with regard to duty having been paid became immaterial. A useful analogy may be made between a charge of this offence and a charge of receiving stolen property. Where the defendant has given an explanation, the jury should be told that if they accept it or if it leaves them in doubt, the defendant is entitled to be acquitted. That was, in substance, what the Deputy Chairman told the jury in this case. The evidence relating to the Penzance transactions was admissible as being relevant to the issue of the appellant's honest trading; but even if the Court should be of opinion that it would have been better for the Deputy-Chairman, in the exercise of his discretion, to have excluded it, the admission of the evidence should not be a ground for quashing the conviction. The question put to the appellant with regard to his being an undischarged bankrupt was not so much directed to the appellant's character as to test his veracity with regard to the Penzance transactions; but even if it went to the appellant's character, it

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

cannot be regarded as inadmissible, because the appellant had put his character in issue.

THE LORD CHIEF JUSTICE: The appellant was charged on indictment before the learned Deputy-Chairman of Middlesex Sessions with knowingly harbouring certain uncustomed goods, namely, 382 Swiss watches and other articles, with intent to defraud His Majesty of the duties thereon, contrary to section 186 of the Customs Consolidation Act, 1876. The jury found him Guilty and found the number of watches harboured was 352. The appellant was sentenced to twelve months' imprisonment and has been admitted to bail pending his appeal.

The facts, so far as it is necessary to state them, are that the appellant carried on a jewellery business at his house at Edgware and since early in 1948 had done a considerable business in buying and selling watches. On February 19, 1949, two officers of the Customs visited his house and asked him where he acquired the watches which he was selling. The appellant gave the names of two firms, Abrahams of Hatton Garden and Peter Rees of Maida Vale. He also showed the officers about thirty watches which he said he had for repair, and, being asked if he had any more on the premises, he replied: "No, you are welcome to look round". The officers searched the ground floor and found nothing. On going upstairs they found seventy-six new Swiss watches in cardboard boxes in a bedroom, and the appellant's explanation was that these were all to be returned to Abrahams and that he had forgotten them when speaking to the officers downstairs. The officers then made a further search and found two gold Swiss watches in a drawer of a wardrobe which the appellant said he had bought a year previously at Marlow. It does not seem that much point was made about those two watches, but under a bed the officers found two canvas bags containing no fewer than 361 new Swiss watches and five gold wristbands of American manufacture, which again the appellant said he had forgotten. When giving evidence at the trial, the appellant

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J. Parker, J.

sought to excuse the untruths he had told by saying that he was frightened because he thought the Customs officers were men who had come to do a " hold up " and steal his property. That this explanation was palpably untrue is shown by the fact that not only did the officers produce various of the invoices which had led to their inquiries but also their cards showing their authority and the appellant invited them to look round when they asked him if he had any more watches.

This appeal is brought first on the ground of misdirection, secondly on the ground of certain questions that were put by the learned Chairman to the appellant when he was giving evidence, and on certain other grounds to which we will refer in the course of the judgment.

The first ground of appeal is that the learned Chairman misdirected the jury on the onus of proof, or at least did not adequately direct them, and, indeed, it was this ground that largely influenced the Court in giving leave to appeal. The matters raised are of considerable general importance in this class of case and we hope that our judgment may prove of assistance to courts of quarter sessions, who nowadays not infrequently have to deal with indictments for offences under this section. First let us consider the ingredients of the offence and what has to be proved by the prosecution in order to establish a *prima facie* case. Apart from an intent to defraud, with which we will deal separately, the offence consists in knowingly harbouring uncustomed goods, and in our opinion that means that the accused knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused. If they are found in his house, warehouse or other place under his control, that would establish a *prima facie* case that he knowingly harboured them, though no doubt he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had dumped them there without his knowledge or privity. Once it is proved that he knowingly harboured goods subject to duty, section 259 throws

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

on him the onus of proving that the goods are in fact customed. To do this he would have to prove that the duties had actually been paid, or at least that the goods had been declared and that the Customs officers had, in the exercise of a discretion which, as is well known, they are allowed, permitted them to enter. The latter case would probably seldom arise and could only occur in the case of a small amount of spirits, tobacco, jewellery or the like, and we need not deal further with this. But in a case such as the present, unless the accused is or knows the actual importer, so that a receipt for the payment of duties can be produced or first-hand evidence of payment given, it would probably always be difficult, and often impossible, for him to prove actual payment. Though the powers of officers of Customs are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in his possession, to show that duty has been paid. But if the person challenged cannot prove payment, it does not follow that he must be taken to have committed the offence of what for convenience we will call unlawful harbouring. He will not be Guilty unless he knew that duty had not been paid. The prosecution having proved that the accused was in possession of dutiable goods in such circumstances as would entitle a Court to find that he was consciously in possession of them, and the accused having failed to prove that the duty had in fact been paid, there is then, in the opinion of the Court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. That it must be for him to give this explanation is because the facts relating thereto must be exclusively within his knowledge. There is, in fact, a shifting of the burden of proof, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively: see *Stephen's Law of Evidence*, 12th ed., Article 104, and that this applies to criminal cases no less than civil, is shown by KAKELO, 17 Cr. App. R. 149; [1923] 2 K. B.

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J.
Hilbery, J.,
Parker, J.

795. A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if in fact they had been? In the course of his summing-up the learned Deputy-Chairman quoted a passage from a recent judgment of this Court, in which I said: "If a man buys something from a trader in the ordinary way (it does not matter whether it is wholesale or retail), you would presume when he buys it in the ordinary way that he has bought it honestly and that the duty on it has been paid". It would perhaps have been more accurate if I had said, "that he had no knowledge or reason to believe that the duty had not been paid". Having arrived thus far, it appears to the Court that Mr. Widgery was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be *prima facie* evidence of guilty knowledge, or, in other words, to raise a presumption of guilt, so that if no explanation is given by the receiver the jury are entitled, but not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed or it leaves them in doubt whether he knew, he should be acquitted.

Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded. But as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances.

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

If a jury is satisfied that the defendant knew, which, of course, would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the Revenue. That there may be cases where the circumstances would negative the intent is possible, but ordinarily speaking it is indeed difficult to see how it could be found that he did not intend to defraud the Revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when challenged on the matter.

Having thus dealt with the onus on the prosecution and defence respectively, we must see how the learned Deputy-Chairman charged the jury. In the early part of the summing-up, after dealing with what the Customs must prove to establish a *prima facie* case, he said: " You have to inquire whether the defendant was knowingly harbouring uncustomed goods with intent to defraud, or has he satisfied you that these goods have paid the duties ". Now this says nothing about the defendant's knowledge, but it has to be remembered that at the outset of the case, and in the absence of the jury, it had been agreed that if the defendant satisfied the jury that he had bought the goods in the ordinary way of business from Abrahams and Rees the prosecution would accept that as proof that the duty had been paid. Of course, that did not mean that if some, may be a few, watches were shown to have been bought from these traders, that would cover every watch, but it would cover those which the jury were satisfied had been so bought, and when returning their verdict the jury gave the number of watches about which they were not satisfied. It might, perhaps, have been better and more accurate had the agreement been that the prosecution would accept proof of purchase as proof that the defendant did not know that duty had not been paid, but clearly the case was tried throughout on the footing that proof of purchase in the ordinary way of trade should be equivalent to proving that duty had been paid

and should be accepted as discharging the onus that section 259 put on the defendant. Accordingly knowledge as a separate issue became irrelevant, because the agreement was that, if he proved that the goods were bought in the ordinary course of business, he was entitled to an acquittal. This also explains the reference by the Deputy-Chairman to the passage from the judgment of this Court to which I have already referred. Later the Deputy-Chairman said: "The defendant's case is that he is an honest trader and he bought these things in the honest way in the course of business. If you accept that he is an honest trader and if you accept that he bought all these things from Abrahams and Rees, you will acquit him. If your minds are in doubt (it being for him to establish that they have come to him honestly) whether he has established that they have come to him honestly—and you think he has not quite established it—then his good character stands by him—and if you have a reasonable doubt about it, a business doubt, as you would have about your own transactions, then again you will acquit him; but if he has failed to satisfy you, you will convict him". This, we think, was, and was intended to be, a direction on the lines now given in cases where there is an onus on the defendant, that the same high standard of proof is not required from him as from the prosecution, and he concluded by saying: "If he has satisfied you"—that is, satisfied you that he bought in the ordinary course of trade—"acquit: if your minds are in reasonable doubt, acquit: if he does not satisfy you, convict". We do not think any reasonable jury could be in any doubt as to how to regard the onus: that there was an onus on the defendant is clear, and the jury were told that, if they were in doubt as to whether he had discharged it, they should acquit. It may be that was really putting the matter too favourably to the defendant; it certainly was not putting it too strongly against him. In the result, having regard to the course taken at the trial with the assent of both counsel, we cannot hold that there has been any misdirection on this matter.

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

The next matter urged in support of the appeal has given the Court some trouble. There were in the hands of the prosecution certain invoices for watches supplied by the defendant to one, Hutchins of Penzance, which were not the subject of the charge. A discussion took place at the opening of the trial, the result of which was that Mr. Widgery for the prosecution agreed not to refer to the invoices in opening, but he clearly reserved his right to refer to them or to call evidence about them by way of rebuttal should they become relevant on account of the defence which might be developed. The Deputy-Chairman said that, if necessary, the matter could be discussed again. Mr. Widgery, in the exercise of his discretion, and we are far from saying that he did not exercise it wisely, did not refer in any way to those invoices in his cross-examination of the defendant. The Deputy-Chairman, however, took up this matter after the defendant's evidence had been given; he had him recalled and put a good many questions to him about the invoices, obviously with the view to testing his evidence that he was an honest trader. There were 191 watches sold to Hutchins in a comparatively short time, though over a year before the seizure of the watches which were the subject of the charge. We cannot say that the examination was irrelevant as it was material to the question whether the defendant was an honest trader. In his reference to this matter in his summing-up, it is true that the Deputy-Chairman did not point out that those watches might have come from stock or that the defendant might have a difficulty in remembering where he got them, especially as he was giving evidence some two years after the sale. But he did remind the jury that, though the defendant might not have satisfied them that he got the watches from Abrahams or Rees, they were to consider his evidence that they might have come from elsewhere, and that if they were left in some doubt as to his explanation they should acquit. We think that on this part of the case the jury must have understood the direction to be: "If you think his explanation possible, though you have some doubt about it, you should acquit".

1950.
Dec. 18

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

This Court thinks it would have been better had the Deputy-Chairman not, at that late stage of the evidence, put this cross-examination to the defendant, but, as we have said, it was not irrelevant.

Then it was said that the defendant was improperly cross-examined by the Deputy-Chairman as to character, because he was asked if he was not an undischarged bankrupt. The Deputy-Chairman apparently asked that question because the defendant had said that he bought a stock of watches and a shop from a man named Scatterfield, again for the purpose, apparently, of accounting for his possession of some at least of the watches sold to Hutchins. It certainly was a somewhat odd transaction and the defendant gave the vaguest possible account of it: the Deputy-Chairman put this question and reminded the jury that he did so, not so much on a question of character as to test his evidence as to the truth of this alleged purchase. We cannot hold, in these circumstances, that the question offended against the statute and, moreover, as the Deputy-Chairman said, the defendant had put his character in issue. Then we allowed Mr. Marshall to deal with a matter that had not been raised by the notice of appeal, which was that the Deputy-Chairman handed to the jury the notebook which the Customs officer had used to refresh his memory, but which had not been put in by either side as evidence. This was done without objection during the summing-up and was evidently thought of so little importance that it was not included in the notice of appeal. We could not allow a matter of that sort, certainly if it stood alone, to influence the result of an appeal. This Court has said more than once that if a slip is made in the course of a case that can be remedied, a defendant cannot lie by and take no objection and then use it as a ground of appeal. On this point we would call attention to what was said in NEAL, 33 Cr. App. R. 189; [1949] 2 K. B. 590. There the irregularity was of so novel a character that we did not think counsel could fairly have been expected to deal with it when it emerged suddenly just before the jury

1950.
Dec. 18.

ROBERT ABRAHAM COHEN.

Goddard, L.C.J., Hilbery, J., Parker, J.

returned their verdict. Here obviously the matter was not thought to be of any importance, and as the prosecution had no notice that this point would be raised on appeal they were unable to produce the book for our inspection when the appeal was heard. Finally, Mr. Marshall submitted that the sum of the matters with which we have dealt, whatever the effect of any one of them standing alone might have been, rendered the trial so unsatisfactory as to merit the conviction being quashed. But in the opinion of the Court there has been nothing here that can possibly have resulted in a miscarriage of justice. A misdirection on law has always been treated as a ground for quashing, but for the reasons given when dealing with the direction on the onus of proof, we are of opinion that, having regard to the course of the trial, there was no misdirection. In spite of the other matters which it would have been better had they been omitted, the case was really overwhelming. The circumstances in which the watches were found, the untruths told by the defendant, the explanation of why he told them, which could deceive no one, all point to this being a case in which it would have been impossible for a reasonable jury to have returned any other verdict than the one they did. This appeal fails and is dismissed.

Appeal dismissed.

Solicitors: Arnold Lee & Co., for the appellant; Solicitor of Customs and Excise, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

CATHERINE VALLETT.

1950. *Dec.* 18.

Quarter Sessions—Committal for Sentence—Power of Magistrates—Prisoner Not Previously Convicted—"Antecedents"—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29 (1).

In cases to which section 29 (1) of the Criminal Justice Act, 1948, applies, magistrates have power to commit to quarter sessions for sentence "if, on obtaining information as to his character and antecedents, the Court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that Court has power to inflict".

The appellant, who had not been previously convicted and bore a good reputation for honesty, pleaded Guilty before magistrates to four offences of larceny, each of which involved abuse of a confidential position, and asked for ninety-six similar offences to be taken into consideration.

Held, that the magistrates were not debarred from committing her to quarter sessions for sentence by reason of the absence of any previous conviction and were entitled to do so having regard to her "antecedents".

Appeal against sentence.

The appellant pleaded guilty at a Court of summary jurisdiction to four charges of larceny, and asked for ninety-six outstanding charges to be taken into consideration. The magistrates committed her, under section 29 (1) of the Criminal Justice Act, 1948, for sentence, and on October 3, 1950, she was sentenced by the Appeal Committee of West Kent Quarter Sessions to two years' imprisonment.

The appellant was employed at a laundry, and had for a year prior to her appearance before the magistrates acted as supervisor to stop thefts by employees. In every case the offences related to thefts of property at the laundry, and the

1950.
Dec. 18.

CATHERINE VALLETT.

Goddard, L.C.J., Hilbery, J., Parker, J.

appellant had used the knowledge which she obtained by virtue of her position to assist her in committing the offences. She was thirty-four years of age, and had not been previously convicted, and bore a good reputation for honesty.

M. C. Parker, for the appellant:

The magistrates had no power under section 29 (1) of the Act to commit to quarter sessions for sentence, inasmuch as the appellant had never previously been convicted and bore a good reputation.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The facts of this case, which arise out of an appeal by the appellant against sentence, are these: She pleaded Guilty before justices in the county of Kent to four cases of larceny from her employers. She is a married woman of thirty-four and, so far as anything in the shape of convictions or bad reputation is concerned, before this case there was nothing known against her. She had been employed for some three years at a laundry and for the last year had been appointed a supervisor to stop thefts by employees, because she was a trusted servant. She had to attend meetings every fortnight with her employers to devise different ways of combating thefts, so she knew all the arrangements that had been made for that purpose. She profited by her knowledge to such an extent that on at least 100 occasions she stole other people's property.

She pleaded Guilty to four charges and then the magistrates heard that she wished ninety-six other charges to be taken into account. Thereupon they exercised their powers under section 29 of the Criminal Justice Act, 1948, and committed her for sentence to quarter sessions, because, in their opinion, greater punishment should be inflicted than they had power to inflict. A Court of summary jurisdiction cannot, as a rule, inflict a sentence of more than six months' imprisonment for any single offence. If there is more than one offence

1950.
Dec. 18.

CATHERINE VALLETT.

Goddard, L.C.J., Hilbery, J., Parker, J.

before the Court, the maximum sentence is twelve months' imprisonment.

The history of this section of the Act is perfectly well known. There were two cases before this Court some few years ago, SHERIDAN, 26 Cr. App. R. 1; [1937] 1 K. B. 223; and GRANT (1937), 26 Cr. App. R. 8. Those were cases in which the Court, having agreed under the Criminal Justice Act, 1925, to try a prisoner summarily, found, when they had convicted him, that he had a very bad record of previous convictions. Accordingly they said in each case: "This is too serious a case for us to deal with and we will commit him for trial". If they had known of the previous convictions, no doubt they would never have consented to deal with the prisoner in either case, but, not knowing of them, they convicted him after trial in one case, and on a plea of Guilty in the other. In each case when the prisoner came to quarter sessions, he pleaded *autrefois convict*, and this Court held that that was a good plea, because the magistrates had convicted and therefore they could not commit for trial.

The result was that the Criminal Justice Act, 1948, gave magistrates this new power. Magistrates did not like to be told, and very likely it was right that they should not be told, of previous convictions before they had decided to convict, though very often magistrates have before them a man whom, by reason of his many previous appearances before them, they know quite well has previous convictions. If magistrates find that the prisoner has a bad character and they think that they cannot deal with him satisfactorily, they can now commit him for sentence to quarter sessions.

Mr. Parker has argued that in this case they had no jurisdiction to act under the section, because hitherto the appellant's general reputation was a good one and she had no previous convictions. But the words of s. 29 (1) of the statute are: "If, on obtaining information as to his character and antecedents, the Court is of opinion that they are such that greater punishment should be inflicted" then they may commit him for sentence. It is not necessary to enter into a long

1950.
Dec. 18.

CATHERINE VALLETT.

Goddard, L.C.J., Hilbery, J., Parker, J.

discussion on the word " character ", or to decide whether it means general reputation. It certainly refers, in my opinion, to something more than previous convictions, but the word " antecedents " is as wide as can possibly be conceived. Magistrates have to consider the prisoner's antecedents. What did they find here? They found that the appellant was a married woman living with somebody other than her husband, that she had been put in a position of trust, that in consequence of that position of trust she attended meetings every fortnight with her employers to devise means of checking thefts and used the information she got to carry out thefts, and that she had carried out persistent and wholesale thefts. It seems to the Court, therefore, that those being the antecedents—matters which had gone before the case which was before the magistrates—they were entitled to say: " This is a case in which we can use, and will use, our powers under section 29 ". If it had been intended by the Legislature merely to reverse the decisions in SHERIDAN (*supra*) and GRANT (*supra*), the words in our opinion would have been: " If, on obtaining information as to his previous convictions ". That is not what Parliament has said; it has used wider words and said " character and antecedents ". The character and antecedents of the appellant show that she has been a shameless thief for a long period of time.

In these circumstances we consider that the magistrates had power to commit the appellant to quarter sessions for sentence, and nobody can say that two years' imprisonment for the offences committed is excessive.

The appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PARKER.

VICTOR GATENBY.

1950. *Dec.* 18.

Procedure—Order of Court—Mistake in Drawing Up Order—Inherent Jurisdiction to Rectify.

The Court has an inherent jurisdiction to see that its orders are properly carried out. Where, therefore, the Court quashed a conviction, but made an order in the nature of a *venire de novo*, but, owing to a mistake in the office, the order, when drawn up, stated: "The Court . . . doth allow the said appeal and doth quash the conviction, and direct a judgment and verdict of acquittal on the indictment whereon the appellant was convicted to be entered, but doth order that the appellant be kept in custody and remitted for trial at the M. Assizes now in progress", the Court, on its attention being directed to the mistake, set aside that order and made an order in the following terms: "The Court doth allow the appeal and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and doth order that the appellant do appear at the present Assizes at M. and plead to answer the said indictment, and that in the meantime the appellant be remanded in custody".

Appeal against conviction.

The appellant was indicted at Bolton Borough Quarter Sessions on September 9, 1950, for larceny and pleaded Not Guilty. During the trial the appellant expressed a desire to withdraw his plea and admitted his guilt in the presence of the jury. That was treated as a plea of Guilty, and the appellant was sentenced forthwith by the Recorder to six years' preventive detention, without any verdict of the jury being taken. On November 20, 1950, the Court of Criminal Appeal quashed the conviction on the ground of the irregularity and made an order in the nature of a *venire de novo*.

1950.
Dec. 18.

VICTOR GATENBY.

Goddard, L.C.J., Hilbery, J., Parker, J.

Owing to a mistake in the office, the order was drawn up in the following form: "The Court . . . doth allow the appeal and doth quash the conviction, and direct a judgment and verdict of acquittal on the indictment whereon the appellant was convicted to be entered, but doth order that the appellant be kept in custody and remitted for trial to the Manchester Assizes now in progress".

J. H. Buzzard, for the appellant.
G. C. H. Spafford, for the Crown.

THE LORD CHIEF JUSTICE: In this case an unfortunate mistake was made. The Court, on November 20, found that an irregularity had been committed in the course of the trial, in that, although the appellant withdrew his plea of Not Guilty and pleaded Guilty in the hearing of the jury, the Recorder omitted to take a verdict, which he ought to have done. The appellant, being in charge of the jury, could be convicted only by a verdict of the jury, and the proper course to have taken would have been for the Recorder to turn to the jury and say: "You have now heard the prisoner withdraw his plea and plead Guilty; will you please return a verdict of Guilty". It is a technicality, but it is a technicality that ought to have been observed.

The appellant appealed to this Court on the ground that he had never been convicted by the jury. We held that that was right, but that the irregularity was one which had rendered the trial a nullity, because a judgment could not be entered on the indictment unless there had been a verdict, and therefore the appellant had never been in peril, because there had been no verdict returned on the indictment, and he was therefore wrongfully sentenced at that moment. Accordingly the Court said: "We set aside that judgment which was entered and order a *venire de novo* to issue". The old form of *venire de novo* was a writ addressed to the sheriff calling upon him to cause other lawful jurors to come *de novo* to try the case. In other words, the case had to be tried again.

1950.
Dec. 18.

VICTOR GATENBY.

Goddard, L.C.J., Hilbery, J., Parker, J.

That is what the Court ordered. Unfortunately, through an error in the office somebody used the usual form which is used when the conviction is quashed and the order read: "The Court doth finally determine the same and doth allow the said appeal, and doth quash the conviction, and direct a judgment and verdict of acquittal on the indictment whereon the appellant was convicted to be entered, but doth order that the appellant be kept in custody and remitted for trial at the Manchester Assizes now in progress". The Court did not finally determine the matter. It did allow the appeal and it did set aside the conviction and judgment, but it certainly did not order a judgment and verdict of acquittal on the indictment to be entered.

We are of opinion that there is an inherent power of the Court to see that its orders are properly carried out. We, accordingly, set aside that order and make an order in these terms: "The Court doth allow the appeal and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that the appellant do appear at the present Assizes at Manchester and plead to and answer the said indictment, and that in the meantime the appellant be remanded in custody".

Order accordingly.

GENERAL INDEX

ADMISSIBILITY OF EVIDENCE,
argument on, 193

AGENT,
obtaining by, 168

ANTECEDENTS, 251

ATTAINT, 95

BANKRUPTCY,
offence, 21, 36

BIGAMY,
seven years' absence, 138

BUILDING,
being found by night in, 1

BURDEN OF PROOF. *See* ONUS OF PROOF.

CHARACTER OF PRISONER, 184

CHILD,
capacity to be sworn, 60

COMMITTAL FOR SENTENCE, 112, 120, 220, 230, 251

COMMITTAL FOR TRIAL,
mode of taking depositions, 199

COMMON LAW MISDEMEANOUR, 210

CONDITIONAL DISCHARGE,
effect of order of, 184

CONFESSION,
cross-examination of police before jury, 203
relating to two murders, 72

CONVICTION,
in Northern Ireland or abroad, 18
in Scotland, 18

CONVICTIONS QUASHED, 1, 33, 36, 55, 60, 138, 152, 161, 168, 184, 203, 222

CORRECTIVE TRAINING, 3, 18, 29, 117, 203, 230, 236

CORROBORATION,
direction on, 193

COURT MARTIAL,
conviction before, 18

CREDIT,
obtaining of, 21, 36

CROSS-EXAMINATION,
improper, 108
on circumstances of confession, 203

CUSTOMS OFFENCE, 222, 239

DEPOSITIONS,
method of taking, 199

DISQUALIFICATION,
of juror, 95

FALSE PRETENCES,
form of indictment, 107
obtaining by agent, 168

FINE,
not to be imposed when protection order made, 224

FOREIGN COUNTRY,
conviction in, 18

FRESH EVIDENCE, 146

GROSS INDECENCY,
no physical contact, 135

IMPRISONMENT,
for common law misdemeanour, 210

INDECENT EXHIBITION, 135

INDICTMENT,
amendment of, 168
averment of previous convictions, 9
Customs offence, 222
defective, 168, 222
false pretences, 107

INNOCENT RECEIPT,
misappropriation after, 55

INSANITY,
medical evidence of, 87

IRREGULARITY,
not going to root of conviction, 79

JUROR,
disqualification of, 95

JURORS' BOOK, 95

JURY,
communication to Judge, 33, 79, 152
evidence in absence of, 60
evidence of circumstances of confession, 203
issue of insanity for, 87
prisoner in charge of, 161

LEADING QUESTIONS,
in taking depositions, 199

LOAN,
obtaining of, 21

MAGISTRATES,
duty after bad committal for sentence, 120

MARRYING A SECOND TIME, 138

MEDICAL EVIDENCE,
of insanity, 79

MINIMUM SENTENCE,
of corrective training, 203
of preventive detention, 156, 163

MURDER,
statement confessing more than one, 72

NORTHERN IRELAND,
conviction in, 18

NOTICE,
of previous convictions, 230

NOTICE TO PRODUCE, 42

ONUS OF PROOF,
Customs offence, 239

ORDER OF COURT,
power to amend, 255

PARDON, 95

PHYSICAL CONTACT,
in gross indecency, 135

PLEA OF GUILTY,
misapprehension of law, 138
sentence after, 43

PLEA OF NOT GUILTY,
withdrawal of, 161

POLICE,
duty of on offence by soldier, 150

PREVENTIVE DETENTION, 3, 7, 9, 29, 156, 163, 203

PREVIOUS CONVICTION,
abroad, 18
evidence of, 251
how to be charged, 18
notice of, 42, 184
in Scotland, 18

PRISON COMMISSIONERS,
report of, 203, 236

PRISONER,
not called to give evidence, 108

PROBATION ORDER,
not to be accompanied by fine, 224

QUARTER SESSIONS,
committal for sentence, 112, 120, 220, 230, 251

RECEIVING,
direction to jury, 55, 159

RECENT POSSESSION, 55, 159

REFERENCE,
by Home Secretary, 146

REPORT,
of Prison Commissioners, 203, 236

SCOTLAND,
conviction in, 18

SECOND MARRIAGE,
in bigamy, 138

SENTENCE,
committal for, 112, 120, 220, 230, 251
common law misdemeanour, 210
corrective training, 3, 18, 29, 117, 203, 230
joint indictment, 43
plea of guilty, 43
preventive detention, 3, 7, 9, 29, 156, 163, 203

SENTENCE—*continued*
reduced, 43, 135, 168, 203
supervision order, 9, 24, 26
varied, 9, 156, 163, 224

SERVING SOLDIER,
offence by, 150

SEVEN YEARS' ABSENCE, 188

STARE DECISIS,
extent of rule, 188

SUMMING-UP,
confession, 208
corroboration, 193
Customs offence, 239
receiving, 55, 159

SUSPECTED PERSON, 65, 184

UNCUSTOMED GOODS, 203, 239

VENIRE DE NOVO, 161, 255

VERDICT,
ambiguous, 152
dissatisfaction felt by Judge, 47
prisoner in charge of jury, 161

Reprinted by Photo-Lithography in Great Britain at the Haycock Press Ltd., London.